(1) No. _____

Supreme Court, U.S.
FILED

03 617 OCT 16 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SCOLLON PRODUCTIONS, INC.,
Petitioner,

v.

LISA OCHELTREE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles F. Thompson, Jr.
Counsel of Record
Michael D. Malone
MALONE & THOMPSON
1527 Blanding Street
Columbia, South Carolina 29201
(803) 254-3300

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

21 pp

QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals was correct in ruling that crude and offensive behavior that has sexual content can have a disproportionate impact on women and, therefore, constitute sexual harassment.

2. Whether the Fourth Circuit Court of Appeals was correct in considering conduct that was admittedly not directed at women or Ocheltree in determining that the harassment was severe and pervasive in violation of 42 U.S.C § 2000e-2(a) (1994).

LIST OF PARTIES TO PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

CORPORATE DISCLOSURE STATEMENT

The Petitioner, Scollon Productions, Inc. has no parent corporation and is not owned, wholly or in part, by any publicly-traded corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 7

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS -- THAT SEXUAL CONDUCT IN THE WORKPLACE, IF SUFFICIENTLY SEXUAL IN NATURE AND IF PERVASIVE ENOUGH IS "BECAUSE OF SEX," I.E., THAT SUCH CONDUCT HAS A DISPARATE IMPACT ON WOMEN 7

II. THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTION (FORESHADOWED IN THIS COURT'S DECISION IN *ONCALE V. SUNDOWNER OFFSHORE SERVICES*) OF WHEN CONDUCT WITH SEXUAL CONTENT IS "BECAUSE OF SEX" AND WHEN IT IS NOT 7

III. THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTION OF WHETHER A COURT MAY COMBINE CONDUCT THAT CANNOT BE HARASSMENT WITH CONDUCT THAT MAY BE HARASSMENT TO DETERMINE IF THE STANDARD OF "SEVERE AND PERVASIVE" IS SATISFIED. 11

CONCLUSION 13

APPENDIX ..... App. i

TABLE OF AUTHORITIES

Page(s)

CASES

Andrews v. City of Philadelphia,
895 F.2d 1469 (3d Cir. 1990) 9

Baskerville v. Culligan Int'l Co.,
50 F.3d 428 (7th Cir. 1995) 8, 12

Crist v. Focus Homes, Inc.,
122 F.3d 1107 (8th Cir. 1997) 9

DeAngelis v. El Paso Mun. Police Officers Ass'n,
51 F.3d 591 (5th Cir. 1995) 10

Fox v. Sierra Dev. Co.,
876 F. Supp 1169 (D. Nev. 1995) 10

Galloway v. Gen. Motors Serv. Parts Operations,
78 F.3d 1164 (7th Cir. 1996), *overruled in part on other grounds by Nat'l R.R. Passenger Corp v. Morgan*,
122 S. Ct. 2061 (2002) 10

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993) 8, 9

Henry v. Fed. Home Loan Bank of Topeka,
155 F.3d 1257 (10th Cir. 1998) 9

Jensen v. Eveleth Taconite Co.,
824 F. Supp 847 (D. Minn 1993) 9

Meritor Sav. Bank,
477 U.S. 57 (1986) 11

Ocheltree v. Scollon Productions,
308 F.3d 321 (4th Cir. 2003) 1

Ocheltree v. Scollon Productions, Inc.,
335 F.3d 325 (4th Cir. 2003) 1, 8

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 7, 8, 10, 12

Perry v. Harris Chernin, Inc.,
126 F.3d 1010 (7th Cir. 1997) 12

Radtke v. Everett,
442 Mich. 368, 501 N.W.2d 155 (1993) 10

Robinson v. Jacksonville Shipyards, Inc.,
760 F. Supp 1486 (M.D. Fla. 1991) 9-10

Spicer v. Com. of Va. Dept. of Corrections,
66 F.3d 705 (4th Cir. 1995) (*en banc*) 8

Stahl v. Sun Microsystems, Inc.,
19 F.3d 533 (10th Cir. 1994) 9

Turnbull v. Topeka State Hosp.,
255 F.3d 1238 (10th Cir. 2001) 9

Vandeventer v. Wabash National Corp.,
887 F. Supp. 1178 (N.D. Ind. 1995) 10

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-2(a) 1

OTHER AUTHORITIES

Kathryn Abrams,
The New Jurisprudence of Sexual Harassment,
83 Cornell L. Rev. 1169 (1998) 10

Cheryl L. Anderson,
Thinking Within the Box: How Proof Models Are Used to Limit the Scope of Sexual Harassment Law,
19 Hofstra Lab. & Emp. L.J. 125 (2001).....10

Robert Kearney,
The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads,
20 Hofstra Lab. L.J. 185 (Spring 2003) 2, 10

Vicki Schultz,
Reconceptualizing Sexual Harassment,
107 Yale L.J. 1683 (1998) 10

David S. Schwartz,
When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law,
150 U. Pa. L. Rev. 1697 (2002).....10

OPINION BELOW

The Fourth Circuit Court of Appeals issued two decisions in this case. The first decision by a three-judge panel was voided by the subsequent opinion of the Fourth Circuit Court of Appeals sitting en banc. The initial decision is reported as *Ocheltree v. Scollon Productions*, 308 F.3d 321 (4th Cir. 2003). The en banc decision is reported as *Ocheltree v. Scollon Productions*, 335 F.3d 325 (4th Cir. 2003). The district court did not publish an opinion in this case. Its initial written order (judgment) and amended judgment are reprinted in the Appendix at App. C and App. D

JURISDICTION

The Fourth Circuit filed its decision on July 18, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

42 U.S.C § 2000e-2(a) (1994)

"It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .."

STATEMENT OF THE CASE

Scollon Productions is a character costume company. They make character costumes such as the Flintstones, Spongebob Squarepants, "Barney,"and "Tweety Bird." They also make character costumes for college and professional sports teams. The company employs about fifty employees in White Rock, South Carolina including sculptors, sewers, and design artists. Lisa Ocheltree worked for Scollon for only eighteen months. After being terminated for unrelated

reasons, Ocheltree accused her co-workers of sexually harassing her. Although Scollon disputes her accounts, Ocheltree's story evolved to include tales of shockingly crude and inappropriate conduct. Sitting *en banc*, the Fourth Circuit Court of Appeals ruled that such conduct was sexual harassment because it had a disproportionate impact on women. This case therefore presents what commentators have described as one of the last "few great issues left to decide" of harassment jurisprudence. Robert Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 Hofstra Lab. L.J. 185, 186 (Spring 2003)

Bill Scollon and his wife own Scollon Productions and have run it for thirty-one years. Ellery Locklear is the President of the company and has been with Bill and his family twenty-seven years. It is uncontested that Bill Scollon and Ellery Locklear are the only management or supervisory officials within the company.[1]

During the year and a half she was employed, Ocheltree received at least five written warnings and was counseled numerous times about excessive absenteeism and telephone usage in violation of company policy. After one of these warnings, Ocheltree's husband came to the plant, walked into the office of Ellery Locklear (who had just warned Ocheltree that she would be terminated if her conduct did not improve), and told him that he was going to "kick his ass" if he upset his wife one more time. Ocheltree was discharged shortly thereafter. The parties agreed the reasons for the discharge were not relevant to the harassment case and, therefore, no evidence of the discharge was used at

---

1 The Fourth Circuit opinion describes Harold Hirsch as a supervisor. However he was clearly not a supervisor under Title VII. It is uncontested he had no authority to hire fire or discipline. He was, however, a lead person in the production area and was sometimes referred to as a "shop supervisor."

trial by either party. Following her termination, Ocheltree claimed that she was subjected to a hostile environment because co-workers made inappropriate sexual remarks that she overheard and she witnessed incidents she found offensive.

Only once during Ocheltree's employment was Scollon Productions' management ever put on notice of conduct that could possibly constitute sexual harassment of Ocheltree. This was in June of 1994, shortly after Ocheltree was hired, when another employee told Bill Scollon that Ocheltree had complained about a male co-worker who told her an off-color joke. When Ellery Locklear asked Ocheltree about the incident, she confirmed it. Thereafter, as Locklear put it, the man was "terminated immediately." When Bill Scollon apologized to Ocheltree and told her that the employee had been terminated, she responded that she "didn't want him to be fired." Scollon, however, responded, "I am sorry; that is the way it is; we won't stand for it."

Ocheltree readily admits that after the initial incident, she never again complained to Scollon Productions' management about sexual harassment (although she said at trial that she tried to tell someone). When she testified before the Employment Security Commission during its hearing of her claim for unemployment compensation, Ocheltree mentioned she had been sexually harassed after the 1994 incident. This was Ocheltree's first allegation to Scollon Productions' management that she had been sexually harassed after the 1994 sexual harassment complaint.

Although Scollon Productions disputes her accounts, at trial, Ocheltree testified that she often overheard crude comments in the workplace. The following is a frank summary of all evidence presented by Ocheltree of such conduct or comments. At trial, Ocheltree testified that she overheard terms such as "mother fu----," "faggot," "dick head"

and "pussy" every day, and that, daily, her coworkers would talk about sexual activities they engaged in with their wives and girlfriends The males discussed having sex with women including depictions of women enjoying oral, anal and other robust sexual activity. The talk also included profanity and the telling of dirty jokes. The testimony makes clear that these comments were not about Ocheltree and no one was speaking to her.

Inappropriate conduct in the shop that Ocheltree alleged she saw included coworkers simulating sexual acts with a featureless cloth mannequin,[2] and the display of a body-piercing book.[3] Ocheltree alleges that the book contained a picture of a pierced penis and she claimed that her male co-workers laughed at her reaction to the book. Finally, Ocheltree alleged that a co-worker made up a line of music that he sang to her on one occasion. It included the words "come to me, oh baby come to me, your breath smells like c-- to me." (expletive deleted). Other than the "song," the body-piercing book, and the mannequin no conduct or comments were arguably directed at Ocheltree or women in general nor were they about Ocheltree. Because the conduct was not aimed at anyone in particular, or at any gender in particular, it could be offensive to any woman or man who did not enjoy such vulgar behavior. In fact, men who testified at trial said they also found the remarks offensive.

Ocheltree participated in at least some of this crude conduct. She admitted she "was not an angel" and cussed in the workplace. Several witnesses testified they heard

---

2 The en banc court stated the males did this "many times" in front of Ocheltree. Although a co-worker stated that he observed males do this in front of Ocheltree frequently, Ocheltree herself stated it only occurred twice and on at least one of these occasions, she walked in on the conduct.

3 Evidence that Plaintiff herself asked to see this magazine and was voluntarily looking at it while on a break was not refuted at trial.

Ocheltree talk about the size of her husband's penis and other "light" sexual matters. She also brought a picture of herself in a bikini and asked a co-worker if he thought it was sexy. She once brought her daughter into work and they played a game that involved them saying "sh**." (expletive deleted). She also brought a picture into work of a wall upon which her husband had written her name in urine.

In contrast to her trial testimony, in documents submitted with her charge of discrimination, Ocheltree described the harassment as "sexual conversation going on in the shop. Not all the guys would talk bad or ignorant in front of me. Just Jason Savage, Barry Brown. Harold Hirsch would say some nasty things from time to time but he alway[s] apoliged [sic] if he knew I could hear it."

Ocheltree testified that she was never solicited, frightened, touched, or ogled. She also admitted that she was never targeted for sexual comments (with the exception of the made-up song). Even the *en banc* court described the conduct as the men "needling each other." Ocheltree agreed the comments and conduct were not about her. The "song" and the mannequin incidents were the only conduct arguably directed toward her. However, it is unremarkable that some conduct involved her, because, if the atmosphere was as rife with poor taste as she described, it would be amazing if an occasional joke or crude behavior were not pointed at her. It is clear, however, that the vast majority of conduct occurred between the men.

The *en banc* court tried to paint a picture of the men laughing at Ocheltree's expense, however, her testimony did not at all indicate that they laughed at her reaction. Further, the testimony about the laughter only concerned one incident. In any event, the laughter in her presence was no different from the admitted provocation of some of the men toward the other men. The evidence shows, at worst, that the men

enjoyed watching the reactions of anyone who was offended by their behavior.

Scollon Productions provides a mechanism for complaining about harassment. While the policy was not crafted by an attorney to capture the legalisms of sexual harassment law, the employee handbook prohibits verbal abuse and provides that such abuse is grounds for discharge. It also states that the company has an "open door" policy: "Anyone having a complaint or problem should first try to resolve it with their immediate supervisor. Ellery or Bill are usually available throughout the day to help resolve complaints or problems not resolved by supervisors." More importantly, Ocheltree testified that she knew about and understood this policy and understood that Bill Scollon and Ellery Locklear would stop sexual harassment if they knew about it. She could hardly testify otherwise since she made a complaint of harassment in June of 1994 and Scollon took effective action to stop the conduct.

Ocheltree claims that she complained to Hirsch and that Hirsch was her supervisor. However, Harold Hirsch was not a member of Scollon Productions' management. He was an hourly worker who had no authority to hire, fire, promote or discipline employees; he was merely a lead person. He did not participate in the decision to fire Ocheltree nor did he evaluate her performance. Harold Hirsch had no authority to determine how many workers would be assigned to the shop, nor could he assign Ocheltree duties, nor schedule her to do particular work. She also claimed she told her co-workers to stop and even complained in a safety meeting. What she did not do was the one thing that would have stopped the alleged conduct. She never told Bill Scollon or Ellery Locklear.

Although Ocheltree concedes she never told management about her concerns, she contends that she tried to talk to Ellery Locklear several times. She claims that one

time Locklear was on the phone and she left him a note saying she needed to talk to him. Locklear testified he tried to find her but she was not in her work area. Locklear also testified that he saw Ocheltree frequently after this and she never approached him to tell him why she wanted to talk to him. Ocheltree never explained why she had time to pass notes or ask to speak to management and yet had no time to mention "sexual harassment."

REASONS FOR GRANTING THE PETITION

I. **THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS -- THAT SEXUAL CONDUCT IN THE WORKPLACE, IF SUFFICIENTLY SEXUAL IN NATURE AND IF PERVASIVE ENOUGH IS "BECAUSE OF SEX," I.E., THAT SUCH CONDUCT HAS A DISPARATE IMPACT ON WOMEN**

II. **THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTION (FORESHADOWED IN THIS COURT'S DECISION IN *ONCALE V. SUNDOWNER OFFSHORE SERVICES*) OF WHEN CONDUCT WITH SEXUAL CONTENT IS "BECAUSE OF SEX" AND WHEN IT IS NOT.**

In this case, Ocheltree contends she was subjected to a hostile working environment in violation of Title VII. This contention is based, not on allegations of sexual desire or animosity toward women, but on sexually crude speech and conduct--a little of which was directed at Ocheltree but none of which could be said to be directed at her because of her gender.

The *en banc* court adopted the position that the sexually explicit conversations and jokes (a few of which were directed at Ocheltree) was "particularly offensive to women" and that it could be assumed, from the nature of the speech

and conduct, that it was done to make her uncomfortable "as the only woman in the workplace." *Ocheltree v. Scollon Productions Inc.*, 335 F.3d 325, 332 (4th Cir. 2003). In effect, the court found that sexually explicit conversations and conduct have a disparate impact upon women and, therefore, constitute sexual harassment.

To establish a claim of sexual harassment for an abusive work environment, either by co-workers or by a supervisor, Ocheltree must prove that: (1) the subject conduct was unwelcome; (2) it was based upon her sex; (3) it was sufficiently severe or pervasive to alter the conditions of Ocheltree's employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Spicer v. Com. of Va. Dept. of Corrections*, 66 F.3d 705 (4th Cir. 1995) (*en banc*).

This Court made clear that conduct is not "automatically discrimination because of sex merely because . . . [there is] sexual content." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). In other words, Title VII is not a "general civility code." *Id.* The "occasional vulgar banter, tinged with sexual innuendo of coarse or boorish workers" is neither pervasive nor offensive enough to be actionable." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995).

What is unclear is whether or not a court may, albeit "not automatic[aly]," find sexual harassment based on speech or conduct that is not clearly because of sex. As stated above, at most, Ocheltree heard crude remarks on a daily basis and, on a few occasions, witnessed conduct that was in poor taste. Except for a few disputed incidents, none of this was directed at Ocheltree. None of the remarks or conduct (including those directed at Ocheltree) were gender specific nor do they reflect gender-based animus. The conduct was

equally applicable and equally offensive to men and women. *See, Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993) (harassment must be on the basis of sex). Contrary to the conclusions of the fourth circuit court, none of the conversations put women in a demeaning or negative light nor did they suggest abuse, control, or the use of force by males over females.

The Fourth Circuit Court has taken the position that gender-neutral conduct that is sexual in nature can have a disproportionate impact on women and therefore can be sexual harassment. The court based this on: (1) the song; (2) male co-workers showing Ocheltree a picture of a pierced penis and then laughing; (3) male co-workers pantomiming oral sex in front of Ocheltree and then laughing; and (4) male co-workers talking about sex with their wives and girlfriends.

To a greater or lesser extent, other federal courts have made similar rulings or have rejected this theory. *Turnbull v. Topeka State Hosp.,* 255 F.3d 1238 (10th Cir. 2001) ("conduct that affects both sexes may constitute sexual harassment if it disproportionately affects female staff"); *Henry v. Fed. Home Loan Bank of Topeka,* 155 F.3d 1257, 1261 (10th Cir. 1998) (overtly sexual conduct may be presumed to be because of gender); *Crist v. Focus Homes, Inc.* 122 F.3d 1107 (8th Cir. 1997) ("a finding that his conduct disproportionately affected female staff could support a determination that the harassment was based on sex"); *Stahl v. Sun Microsystems, Inc.,* 19 F.3d 533, 538 (10th Cir. 1994) (basing finding of harassment in part on allegedly derogatory language); *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1482 (3d Cir. 1990) (basing finding of harassment in part on sexual innuendo, materials, and conduct in the workplace--intent should be recognized as a matter of course) *Jensen v. Eveleth Taconite Co.,* 824 F. Supp 847, 880 (D. Minn 1993) (holding females should not be subjected to sexually suggestive language); *Robinson v. Jacksonville Shipyards, Inc.,* 760 F. Supp

1486, 1522-23 (M.D. Fla. 1991) (recognizing some language has a disproportionate impact on women); *See, contra, Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) *overruled in part on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2074 n.11 (2002); *Fox v. Sierra Dev. Co.*, 876 F. Supp. 1169, 1175 (D. Nev. 1995); *Vandeventer v. Wabash National Corp.*, 887 F. Supp. 1178 (N.D. Ind. 1995); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir.1995); *Radtke v. Everett*, 442 Mich. 368, 501 N.W.2d 155, 167 (1993); See also, Robert Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 Hofstra Lab. L.J. 185 (Spring 2003) (examining the issue of a disparate impact theory of sexual harassment); David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. Pa. L. Rev. 1697, 1784 (2002) (same); Cheryl L. Anderson, *Thinking Within the Box: How Proof Models Are Used to Limit the Scope of Sexual Harassment Law*, 19 Hofstra Lab. & Emp. L.J. 125, 170 (2001) (same); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 Cornell L. Rev. 1169, 1223 (1998) (same); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1762 (1998) (same).

The fourth circuit court admitted that the vast majority of the rude conduct did not involve Ochletree and was not about her. Instead, it was about the mens' sexual exploits. However, the court failed to acknowledge the legal significance of this fact. Instead, the court argued the conduct had a disproportionate impact on women. This simply does not fit within any form of harassment clearly recognized by this court. *See, Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 80 (1998) (recognizing that illegal harassment could be: (1) desire-based conduct, (2) sexually derogatory terms reflecting hostility toward women, and (3) differing treatment between men and women). The conduct described by Ocheltree did not reflect an animus toward women. Clearly, no one stated or implied that women were unwanted in the

workplace. Also clearly, no one reflected a sexual interest in Ocheltree herself. Instead, the fourth circuit court has recognized a new form of harassment. In doing so, the court relied on sex-neutral, albeit crude and gross, behavior. The "song" could apply to either a male or a female. The sexual exploits discussed between the men describe women engaging in, and enjoying, what used to be considered deviant and even subservient behavior but which now are accepted contemporary sexual practices.

A disparate impact theory of sexual harassment is contrary to the rulings of this court and the plain language of Title VII. Harassment must be "because of" sex. Conduct that is admittedly neutral cannot be sexual harassment. Far from effectuating the purposes of Title VII, the fourth circuit court issued a paternalistic ruling that runs counter to Title VII's purpose of promoting the equal treatment of women in the workplace.

III. THIS COURT SHOULD ADDRESS THE IMPORTANT QUESTION OF WHETHER A COURT MAY COMBINE CONDUCT THAT CANNOT BE HARASSMENT WITH CONDUCT THAT MAY BE HARASSMENT TO DETERMINE IF THE STANDARD OF "SEVERE AND PERVASIVE" IS SATISFIED

The third requirement for a Title VII claim is proof that the discrimination is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Sav. Bank,* 477 U.S. 57, 67 (1986). It was the Ocheltree's burden to demonstrate that the harassment was sufficiently severe or pervasive to create an objectively hostile or abusive work environment in violation of Title VII. In this case, none of the incidents about which Ocheltree or other witnesses testified suggest the kind of intimidating environment or constant and obscene behavior that constitutes an actionable sexually abusive environment.

All statements about which Ocheltree complains were delivered in a public setting where they were heard by anyone who was present--regardless of their gender. None of the statements were specifically directed at her. Ocheltree was never touched. She was never physically threatened or humiliated. Most of the allegedly offensive statements could be broadcast on primetime television.

To overcome this difficulty, the fourth circuit court combined the few instances that were arguably directed at Ocheltree with the background conduct that clearly could not be considered sexual harassment. The court thereby improperly converted conduct that does not violate Title VII to conduct that does. Although a court should consider the context and overall picture of the workplace in which the alleged harassment occurs, the fourth circuit has misconstrued this direction. *Oncale*, 523 U.S. at 81-82. In this case, the background conduct was clearly not aimed at Ocheltree or women at all. Although graphic and crude, it carried no inference of hostility toward women or Ocheltree. Far from providing a discriminatory explanation to the conduct aimed at Ocheltree, the background conduct makes clear that the behavior that directly involved Ocheltree was not based on sex. It was instead part of a larger pattern of inappropriate, but not illegal, sexual bantering and joking.

Once the background is isolated form the events that directly effected Ocheltree (or once it is cast in the proper light), the conduct described in this case falls far short of the standard of "hellish." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir.1997) (quoting *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir.1995)). She describes, at worst, occasional conduct that was unpleasant. This is clearly insufficient to constitute severe and pervasive conduct.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

MALONE & THOMPSON,

Charles F. Thompson, Jr.
Counsel of Record for Petitioner
1527 Blanding Street
Columbia, South Carolina 29201
(803) 254-3300

Michael D. Malone
1527 Blanding Street
Columbia, South Carolina 29201

Supreme Court, U.S.
FILED

(2) No. _____

03 617 OCT 16 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SCOLLON PRODUCTIONS, INC.,
Petitioner,

v.

LISA OCHELTREE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Charles F. Thompson, Jr.
Counsel of Record
Michael D. Malone
MALONE & THOMPSON
1527 Blanding Street
Columbia, South Carolina 29201
(803) 254-3300

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

107 pp

TABLE OF CONTENTS
APPENDIX TO PETITION

Page

Published Opinion on Rehearing *En Banc* of
The United States Court of Appeals
For the Fourth Circuit
Affirmed in Part and Reversed in Part
entered July 18, 2003 ..... App. A

Published Opinion of
The United States Court of Appeals
For the Fourth Circuit
Reversed and Remanded with Instructions
entered October 10, 2002 ..... App. B

Amended Judgment in a Civil Case
entered April 17, 2001 ..... App. C

Order of
The United States District Court
For the District of South Carolina
Re: Denying Defendant's Motion for Judgment, Granting Defendant's
Motion to Amend Judgment, and Granting Plaintiff's Motion for an Award of
Attorney's Fees
entered April 16, 2001, ... App. D

OPINION ON REHEARING EN BANC
PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LISA L. OCHELTREE,
Plaintiff-Appellee,

v.

SCOLLON PRODUCTIONS,
INCORPORATED,
Defendant-Appellant.

LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW; ASIAN No. 01-1648
AMERICAN LEGAL DEFENSE AND
EDUCATION FUND; PUBLIC JUSTICE
CENTER; WOMEN'S LAW CENTER OF
MARYLAND, INCORPORATED; D.C.
EMPLOYMENT JUSTICE CENTER;
WOMEN'S LAW PROJECT; AMERICAN
CIVIL LIBERTIES UNION WOMEN'S
RIGHTS PROJECT; EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Amici Supporting Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Matthew J. Perry, Jr., Senior District Judge.
(CA-96-1215)

Argued: February 25, 2003
Decided: July 18, 2003
Entered: July 18, 2003

Before WILKINS, Chief Judge, and WIDENER, WILKINSON, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, 6525 35 10 TRAXLER, KING, GREGORY, and SHEDD, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Michael wrote the opinion, in which Chief Judge Wilkins, Judge Wilkinson, Judge Luttig, Judge Motz, Judge Traxler, Judge King, Judge Gregory, and Judge Shedd joined. Judge Niemeyer wrote a separate opinion, concurring in the judgment. Judge Williams wrote a separate opinion, dissenting in part and concurring in the judgment in part, in which Judge Widener joined.

COUNSEL

ARGUED: Charles Franklin Thompson, Jr., TALLY, MALONE, THOMPSON & GREGORY, Columbia, South Carolina, for Appellant. William Elvin Hopkins, Jr., MCCUTCHEN, BLANTON, RHODES & JOHNSON, L.L.P., Columbia, South Carolina, for Appellee. Louis Lopez, Office of General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae Commission. **ON BRIEF:** Michael D. Malone, TALLY, MALONE, THOMPSON & GREGORY, Columbia, South Carolina, for Appellant. Nicholas M. Inzeo, Acting Deputy General Counsel, Philip B. Sklover, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, Office of General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae Commission. Michael L. Foreman, Audrey A. Jordan, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, D.C., for Amici Curiae Committee, et al. Wendy N. Hess, Murnaghan Appellate Advocacy Fellow, PUBLIC JUSTICE CENTER, Baltimore, Maryland, for Amici Curiae Center, et al.

OPINION

MICHAEL, Circuit Judge:

A jury found that Lisa Ocheltree, a plaintiff suing under Title VII of the Civil Rights Act of 1964, was the victim of severe or pervasive sex-based harassment in her workplace at Scollon Productions, Inc. We granted en banc review to consider whether the district court properly denied the company's motion for judgment as a matter of law. Because there is a "legally sufficient evidentiary basis," Fed. R. Civ. P. 50(a)(1), for the jury's finding that Ocheltree proved the elements of her claim, we affirm the judgment insofar as it awards compensatory damages. However, because there is no evidence that Scollon Productions had the knowledge required for liability in punitive damages, we reverse the award of punitive damages.

I.

Scollon Productions makes costumes, including ones depicting university mascots and cartoon characters. The company has about fifty employees and is located in White Rock, South Carolina. J.A. 283. The only persons with formal management authority at the company are Bill Scollon, the president, and Ellery Locklear, the senior vice president. J.A. 157, 282, 288. The company's production facilities include a sewing room and what is called the production shop. The production shop itself is fairly small, with enough work tables to accommodate about a dozen employees, including the shop supervisor. J.A. 109-11, 211-12, 216, 287. Bill Scollon and Locklear have their offices near the production facilities. J.A. 216.

Ocheltree was employed at Scollon Productions for eighteen months, from February 1994 until August 1995. She worked in the production shop making shoes. Ocheltree was the only female employee in the shop, working alongside ten or eleven men. J.A. 103, 110. In the early stages of her employment, the atmosphere in the shop was "fun" and "friendly," but this changed. During her first year there, coarse sexual talk and sexual antics by several of the men began to occur with increasing frequency. This misconduct worsened as time went on, especially after Ocheltree complained to the men and the shop supervisor, Harold Hirsch. J.A. 111-14, 199-200, 202-03. The details of the sexual talk and conduct that Ocheltree heard and saw during her tenure in the production shop are as follows.

Scollon Productions has mannequins that are used in the production of its costumes. Some of the men in the production shop often used a female-form mannequin as a prop to engage in sexual antics in front of Ocheltree. Many times when Ocheltree was in sight of the mannequin, the men would fondle it or use it to demonstrate sexual techniques, including oral sex. J.A. 200-02. One shop employee, Brian Hodge, noticed that "anytime [Ocheltree] was walking by just about they would do something sexual to the mannequin in front of her." J.A. 202. On one occasion, for example, two male shop employees were positioned at the mannequin when Ocheltree arrived at work. One was pinching the mannequin's nipples, and the other was on his knees simulating oral sex on the mannequin. Ocheltree said to the men, "You guys are disgusting, this needs to stop." The incident prompted Ocheltree to leave the room. As she walked out, she heard laughter in the background. J.A. 115-17.

On another occasion a male coworker came up to Ocheltree in the production shop and sang the following song to her "like he was in the opera": "Come to me, oh,

baby come to me, your breath smells like c[o]m[e] to me." J.A. 114-15. Ocheltree immediately told the man that he was disgusting. Nevertheless, the other men in the production shop, including supervisor Hirsch, expressed their enjoyment of the incident with much laughter. *Id.* On still another occasion when Ocheltree was seated at her work station, some of her male coworkers were looking at a book that contained pictures of men with pierced genitalia. One coworker took the book, approached Ocheltree, and opened it to the centerfold photograph showing a man's crotch area. The scrotum was pierced with hoops, and there were chains running up to the top of the penis. The coworker, with his male colleagues looking on, said, "Lisa, what do you think about this?" Again, this generated laughter from the men in the shop. J.A. 117-18.

As time went on, Ocheltree's male coworkers subjected her to a daily stream of discussion and conduct that was sex based or sexist. J.A. 114, 120, 204, 214. First, the men in the production shop used explicit sexual insults to needle each other in front of Ocheltree. For example, "[g]uys would make hand gestures down at their private parts and tell other guys to suck it." J.A. 113. Some of the men at times suggested that two of their number were involved in a homosexual relationship. The men engaging in this sort of talk "pick[ed] on" their subjects by discussing the details of anal sex, saying specifically that they "wonder[ed] who was on top and who took it up the ass." J.A. 200. There were also comments that one employee was hav- ing sex with a dog. J.A. 229. Second, Ocheltree's male coworkers constantly discussed their sexual exploits with their wives and girlfriends in extremely graphic terms. The men talked every day about their sexual experiences of the night before, making comments about their female partners such as "she swallowed, she gave good head, [or] I fucked her all night long." J.A. 118. One employee announced that his girlfriend "gave good head[,] that she likes to swallow, that she liked it

from behind, [and] that she would do it anywhere with him." J.A. 120. He added that she "could suck a golf [ball] through a garden hose." *Id.* Another employee in the shop often "would speak of [his wife] sucking his dick and swallowing and letting it run down the side of her face and stuff." J.A. 200. Finally, on one occasion, shop supervisor Hirsch said that he was interested in having sex with young boys and that he "enjoyed . . . licking young boys[']dicks." J.A. 119. Ocheltree was convinced that Hirsch and other men in the shop engaged in sexual talk and antics "in front of [her] because they enjoyed looking at [her] and seeing [her] reaction." J.A. 119. Indeed, Hirsch frequently joined in the shoproom laughter that erupted at Ocheltree's expense. J.A. 115, 118. There were times when the sexual talk in the production shop got so far out of hand that Ocheltree would "turn red [and] would have to get up and leave [her] work area. . . just to get away from the atmosphere." J.A. 120.

According to Bill Scollon, his company has a sexual harassment policy that is covered by the section entitled "Talking" in the employee handbook. J.A. 299 300, 352. Sexual harassment is not mentioned in the section. It only states that "[l]oud talking, yelling, uncontrolled laughter, swearing, and verbal abuse of co-workers, and supervisors is not acceptable. Verbal abuse, swearing, etc. are grounds for termination." J.A. 352. The handbook's "Open Door Policy" directs that "[a]nyone having a complaint or problem should first try to resolve it with their immediate supervisor." J.A. 355. The policy goes on to say that "Ellery [Locklear] or Bill [Scollon] are usually available throughout the day to help resolve complaints or problems not resolved by supervisors." *Id.*

Ocheltree believed that she was being subjected to sexual harassment in her workplace, and she made attempts to register complaints as the employee handbook prescribed. She complained repeatedly to Hirsch, the shop

supervisor, who ignored the problem. J.A. 122. Ocheltree then attempted to register her concerns with Scollon and Locklear, but in Ocheltree's words, "[t]hey wouldn't give [her] time of day." J.A. 137. She went to Scollon's office several times and asked if he had a minute to talk with her. J.A. 122-23. In each instance Scollon told her that he did not have time and that she should "go see Mr. Locklear" or "go back to work." J.A. 123-24. Scollon acknowledges that on one occasion when Ocheltree attempted to speak with him, he told her it was not an appropriate time. He admits that he turned her away because he believed that whatever she wanted to talk about was not important. J.A. 299. Locklear was likewise never available to hear Ocheltree's complaints. Once when Ocheltree went to Locklear's office, he was on the telephone; she put a note on his desk, saying: "Ellery, Need to talk to you, very important, Lisa." J.A. 123. She underlined "very important." Locklear indicated that he saw the note, but he never talked with her. *Id.* When Ocheltree left her work station because the sexual and sexist talk was getting out of hand, Hirsch would follow her to prevent her from speaking to Scollon or Locklear. J.A. 120, 123-24. For example, if she took refuge in the bathroom at these times, Hirsch would often be waiting when she emerged, telling her to go back to work. Ocheltree lost track of the number of times she tried to talk with Locklear, only to have Hirsch order her back to work. J.A. 123-24. Ocheltree summed it up this way: "[Hirsch] knew [that] I was going to go and tell [Locklear or Scollon about the men's behavior] because he would not go forward with it. He would tell me to get back to work, that if I had something. . . to say to Bill or Ellery they would come to me and talk to me [and] that he would relay the message." *Id.*

After Ocheltree had no success in voicing her complaints through regular channels, she decided to speak up at a safety meeting for the production shop. She knew that a supervisor would be taking minutes, and she believed

the minutes would be passed along to Scollon and Locklear. Ocheltree "addressed everyone," saying that "the sexual conduct, pictures, the gestures, the imitating of sex to mannequins and all that" should stop. J.A. 144-45, 203. The offensive conduct ceased for two or three hours, but then resumed with the same intensity. J.A. 203-04.

Her treatment at Scollon Productions left Ocheltree "embarrassed, humiliated, angered," and "totally down all the time." J.A. 127. She found it hard to be around groups of people and, as a result, stopped attending functions and activities that her two children were involved in. She has been on and off antidepressants. J.A. 125-26.

In April 1996 Ocheltree filed a complaint against Scollon Productions in the United States District Court for the District of South Carolina, asserting sex discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and South Carolina state law. The district court granted summary judgment to Scollon Productions, and Ocheltree appealed. We vacated the judgment on the hostile work environment claim, concluding that there were genuine issues of material fact as to the imputation of liability element of that claim. *Ocheltree v. Scollon Prods., Inc.*, 161 F.3d 3 (table), 1998 WL 482783 (4th Cir.). Ocheltree's case went to trial after remand, and the jury returned a verdict in her favor, finding (in special interrogatories) that she had been subjected to a hostile work environment because of her sex. The jury awarded her $7280 in compensatory damages and $400,000 in punitive damages. The district court denied Scollon Productions' Rule 50 motion for judgment as a matter of law, but reduced the punitive damages to $42,720, bringing the total judgment in line with the $50,000 cap imposed by 42 U.S.C. § 1981(a)(b)(3)(A). Scollon Productions appealed, and a divided panel of this court held that the company was entitled to judgment as a matter of law because the offensive

behavior directed at Ocheltree was neither because of her sex nor sufficiently severe or pervasive to constitute a hostile work environment. *Ocheltree v. Scollon Prods., Inc.*, 308 F.3d 351 (4th Cir. 2002). We vacated the panel decision and reheard the case en banc.

II.

Scollon Productions argues that the district court erred in denying its Rule 50 motion for judgment as a matter of law because "there is no legally sufficient evidentiary basis" for the jury's verdict. *See* Fed. R. Civ. P. 50(a)(1). Our review is de novo. *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 457 (4th Cir. 2002). We view the evidence (and recount it in part I) in the light most favorable to Ocheltree, the nonmovant, "draw[ing] all reasonable inferences in her favor without weighing the evidence or assessing the witnesses' credibility." *Id.* Judgment as a matter of law is proper only if "there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

III.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). This provision "not only covers `terms' and `conditions' in the narrow contractual sense, but `evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employ -ment.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). Title VII is violated "[w]hen the workplace is permeated with discriminatory [sex-based] intimidation, ridicule, and insult

that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted). To establish a Title VII claim for sexual harassment in the workplace, a female plaintiff must prove that the offending conduct (1) was unwelcome, (2) was based on her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer. *Spicer v. Va., Dep't of Corr.*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc); *Anderson*, 281 F.3d at 458. Scollon Productions does not dispute that Ocheltree proved the first element of her sexual harassment claim, unwelcome conduct. The company argues, however, that the evidence was insufficient to establish the other three elements of the claim. We will discuss each of these elements and the sufficiency of the related evidence.

A.

The second element of the test requires proof that the offending conduct was based on the plaintiff's sex. This element comes straight from Title VII's "discriminat[ion] . . . because of . . . sex" requirement. 42 U.S.C. § 2000e-2(a)(1). "`The critical issue [in the "because of sex" inquiry] is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)). A woman may prove sex-based discrimination in the workplace even though she is not sub- jected to sexual advances or propositions. *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 242 (4th Cir. 2000); *see also Oncale*, 523 U.S. at 80. A trier of fact may reasonably find discrimination, for example, when a woman is the individual target of open hostility because of her sex, *Smith*, 202 F.3d at 242-43, or when "a female victim is harassed in such sex-specific and

derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace," *Oncale*, 523 U.S. at 80.

The jury found specifically that Ocheltree's male coworkers engaged in the harassing conduct "because of [her] sex." Scollon Productions argues that the evidence does not support this finding because the conduct was not directed at Ocheltree (or at women in general) because of sex. The conduct was not directed at Ocheltree or women, the company says, because "it could have been heard [or seen] by anyone present in the shop" and "was equally offensive to some of the men." Appellant's Br. 18, 21. We conclude that the jury's "because of sex" finding is easily sustained. A reasonable jury could find that much of the sex-laden and sexist talk and conduct in the production shop was aimed at Ocheltree because of her sex — specifically, that the men behaved as they did to make her uncomfortable and self-conscious as the only woman in the workplace. Much of the conduct, a jury could find, was particularly offensive to women and was intended to provoke Ocheltree's reaction as a woman.

The disrespectful and degrading song that a coworker sang to Ocheltree in front of the men in the shop — "Come to me, oh, baby come to me, your breath smells like c[o]m[e] to me" — was by its words aimed at a woman. J.A. 115. On the occasion when some of Ocheltree's male coworkers were looking at the book with pictures of men with pierced genitalia, one of the coworkers decided to take advantage of Ocheltree's presence. With his male colleagues watching, the man took the book over to Ocheltree's work station, held up the centerfold photograph (showing a hoop-pierced scrotum and a chained penis) for her to see, and said, "Lisa, what do you think about this?" J.A. 117-18. No man in the shop was subjected to this same embarrassment, and no man there was called upon to offer a reaction to the

photograph while the entire shop looked on. The sexual activity with the mannequin (from simulated oral sex to fondling) occurred repeatedly. Ocheltree's male coworkers did something sexual to the mannequin almost every time she was nearby. All of this conduct provoked much laughter from the men in the shop – laughter at Ocheltree's expense. J.A. 115-17, 200-03. Indeed, a jury could reasonably find that the men engaged in this conduct largely because they enjoyed watching and laughing at the reactions of the only woman in the shop.

The production shop talk that portrayed women as sexually subordinate to men was also calculated to disturb Ocheltree, a jury could easonably find. We refer here to the almost daily accounts from some of the men who described their exploits with their wives and girlfriends in demeaning terms such as "she gave good head," "she likes to swallow," she "let[ ] [the semen] run down the side of her face," and "she like[s] it from behind." J.A. 120, 200. This kind of talk, as well as the sexual antics, got out of hand after Ocheltree's arrival in the production shop; it even escalated after she complained about it. It is true, as Scollon Productions points out, that at least a couple of the men were offended by the sexual talk and antics. There is no evidence, however, that this outrageous conduct was aimed at getting an embarrassed reaction from these men or that it was calculated to generate laughter at the expense of any man. No man was driven from the room because of the conduct, as was Ocheltree on occasion.

To sum up on this point, we conclude that a reasonable jury could find that Ocheltree was the individual target of harassment because of her sex. Moreover, a jury could find that the men in the production shop "harassed [Ocheltree] in such sex-specific and derogatory terms . . . as to make it clear that [they were] motivated by general hostility to the presence of [a] wom[a]n in the [ir]

workplace." *Oncale*, 523 U.S. at 80. In all events, a reasonable jury could find, as did the jury in this case, that Ocheltree was harassed in her workplace because of her sex.

B.

The third requirement for a Title VII claim is proof that the harassment is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Savs. Bank*, 477 U.S. at 67 (internal quotation marks omitted; alteration in original). The "severe or pervasive" element has both subjective and objective components. *Harris*, 510 U.S. at 21-22. Scollon Productions does not challenge the jury's finding that the harassment was "severe or pervasive to [Ocheltree] personally." Rather, the company argues that the evidence was insufficient to support the jury's finding that the harassment would have been "severe or pervasive to a reasonable person in [Ocheltree's] position." In deciding whether a jury could find that a work environment was objectively abusive, that is, abusive to "a reasonable person in the plaintiff's position," *Oncale*, 523 U.S. at 82, we consider all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. This standard is designed to "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (quoting Barbara Lindemann & David Kadue, *Sexual Harassment in Employment Law* 175 (1992)). At the same time, the standard "protect[s] working women from the kind of male attentions that can make the workplace hellish for women." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th

Cir. 1995). *See also Anderson*, 281 F.3d at 459 (quoting *Baskerville*).

Here, a reasonable jury could find that, taken together, the various mannequin incidents, the vulgar song and picture, and the graphic descriptions of sexual activity (especially oral sex) that consistently painted women in a sexually subservient and demeaning light were sufficiently severe or pervasive to alter the conditions of Ocheltree's employment and to create an abusive work environment. After a time, Ocheltree was subjected every day to some variety of this offensive conduct, which was humiliating to her personally and to women in general. The harassment became so offensive at times that it drove Ocheltree from the room. It surely made it more difficult for her to do her job. A rational jury could find that a reasonable person in Ocheltree's situation would regard the work environment at Scollon Productions as abusive.

C.

A Title VII plaintiff, for the fourth element of her claim, must prove that the harassment was imputable on some basis to her employer. In a case where an employee is sexually harassed by a coworker, the employer may be liable in negligence if it knew or should have known about the harassment and failed to take effective action to stop it. *Spicer*, 66 F.3d at 710; *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998) (noting that "[n]egligence sets a minimum standard for employer liability under Title VII"). In a case of harassment by a supervisor "with immediate (or successively higher) authority over the employee," an employer may be found vicariously liable under the standards established in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 765, and *Faragher v. City of Boca Raton*, 524 U.S. at 807-08. Both the negligence and the vicarious liability theories were submitted to the jury in the special

interrogatories, and the jury found in Ocheltree's favor on both theories. We limit our discussion to the negligence (or constructive knowledge) theory because the evidence is sufficient to support the jury's finding that Scollon Productions should have known that Ocheltree was being harassed by her coworkers.

An employer cannot avoid Title VII liability for coworker harassment by adopting a "see no evil, hear no evil" strategy. Knowledge of harassment can be imputed to an employer if a "reasonable [person], intent on complying with Title VII," would have known about the harassment. *Spicer*, 66 F.3d at 710. Under this rule an employer may be charged with constructive knowledge of coworker harassment when it fails to provide reasonable procedures for victims to register complaints. *See, e.g., Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 441 (2d Cir. 1999); *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 540-42 (10th Cir. 1998). The question here, then, is whether a reasonable jury could find that Scollon Productions had constructive knowledge of Ocheltree's harassment because the company failed to provide adequate complaint procedures.

Scollon Productions claims that it has adequate complaint procedures that are set out in its sexual harassment policy. To begin with, it is debatable whether the company actually has a sexual harassment policy. No company document mentions sexual harassment, and there is no evidence that the company conducted any training to prevent sexual harassment. The company claims, however, that its "sexual harassment policy" is contained in two sections of its employee handbook. One section, entitled "Talking," says that "verbal abuse" of coworkers and supervisors is "not acceptable" and is "grounds for termination." J.A. 352. According to Bill Scollon, this is the company's prohibition of sexual harassment. J.A. 299-300. As to the channels for reporting harassment, the company

points to another section of its handbook, entitled "Open Door Policy," J.A. 355, which states: "Anyone having a complaint or problem should first try to resolve it with their immediate supervisor. Ellery [Locklear] or Bill [Scollon] are usually available throughout the day to help resolve complaints or problems not resolved by supervisors." If this amounts to a sexual harassment policy, a jury could reasonably find that it fails to provide reasonable avenues of complaint.

The first problem with Scollon Productions' complaint procedure is that, by the company's own admission, it fails to place any duty on supervisors to report incidents of sexual harassment to their superiors. Bill Scollon acknowledges that a supervisor, such as shop supervisor Hirsch, has no duty under the open door policy to report sexual harassment complaints to either of the two persons with full management authority, Scollon himself or Ellery Locklear. J.A. 311. If a supervisor cannot or does not adequately resolve an employee's complaint, the employee has the responsibility of complaining to the company president or vice president. This approach seems ill designed to ensure that upper management learns of harassment. The victim must muster the courage to make a second complaint, and she may be more reluctant to register that complaint with a top company official. In any case, in deciding whether a company has reasonable complaint procedures, a jury may give negative weight to the fact that a scheme does not require a supervisor, with whom complaints of sexual harassment must be lodged in the first instance, to forward unresolved complaints to higher authority. *See Wilson*, 164 F.3d at 541-42.

The facts also show that Scollon Productions' procedure for employees to report sexual harassment complaints is deficient in another respect. Scollon Productions contends that under its "open door policy,"

Ocheltree had both the obligation and the opportunity to register her complaints with Scollon or Locklear. However, Ocheltree tried unsuccessfully to talk to Scollon and Locklear on numerous occasions. Her intent was to report the harassment. Ocheltree went to Scollon's office several times and asked if he had a minute to talk with her. Scollon told her repeatedly that he had no time and that she should "go see Mr. Locklear" or "go back to work." J.A. 123-24. Locklear was likewise never available to talk with Ocheltree. J.A. 123. In addition, Hirsch, the shop supervisor, knew that she planned to voice her complaints to Scollon or Locklear, and he actively tried to prevent her from doing so. According to Ocheltree, "[Hirsch] knew [that] I was going to go and tell [Locklear or Scollon about the harassment] because he would not go forward with it. He would tell me to get back to work, that if I had something . . . to say to Bill or Ellery they would come to me and talk to me [and] that he would relay the message." *Id.* Again, neither Scollon nor Locklear ever talked with Ocheltree. From this evidence, a jury could reasonably conclude that the company's "open door policy" was an illusion, at least so far as Ocheltree was concerned.

In sum, a reasonable jury could make the basic finding that Scollon Productions did not provide Ocheltree with reasonable avenues for voicing her sexual harassment complaints. In other words, Scollon Productions "did not exercise reasonable care in setting out the channels by which it could receive reports [of sexual harassment], and it is therefore in no position to rely on those inadequate channels to claim that it did not receive notice." *Wilson*, 164 F.3d at 542. Scollon Productions should have known about the harassment, as the jury found, and the company may be charged with knowledge because it did not provide reasonable avenues of complaint. The jury properly imputed the coworker harassment to Scollon Productions under the negligence (or constructive knowledge) theory.

IV.

Scollon Productions also argues that there is no evidentiary basis for a reasonable jury to award punitive damages in this case. A Title VII plaintiff is entitled to punitive damages if her employer engaged in intentional discrimination "with malice or with reckless indifference to [the plaintiff's] federally protected rights." 42 U.S.C. § 1981a(b)(1). As the Supreme Court has said,"[t]he terms `malice' or `reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999). To be liable in punitive damages, "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law." *Id.* at 536. There is not much to be said here. We have combed the record, and we find no evidence that would allow a jury to find that Scollon Productions knew, either directly or by imputation, that it might have been acting in violation of Ocheltree's "federally protected rights." As a result, the award of punitive damages must be set aside.

V.

Because there is a legally sufficient evidentiary basis for a reasonable jury to find that Ocheltree was the victim of sex-based employment discrimination, we conclude that the district court correctly denied Scollon Productions' motion for judgment as a matter of law on her basic Title VII claim. The evidence, however, was not legally sufficient for a jury to find that Scollon Productions had the knowledge required to be liable for punitive damages. Accordingly, we affirm the judgment for the amount awarded in compensatory damages, and we reverse the judgment for the amount awarded in punitive damages.

AFFIRMED IN PART AND REVERSED IN PART

NIEMEYER, Circuit Judge, concurring in the judgment:

This case presents the fortunately unusual circumstances in which the conditions in the entire workplace were coarse — indeed humanly degrading — and about which both male employees and Lisa Ocheltree appropriately complained. Because the basis of this workplace conduct for everyone centered on dirty jokes and allusions to sexual play and perversion, the majority has in my judgment taken it for discrimination by reason of sex and thus blurred the relevant issue. The majority reasons that this general condition of sexually-oriented baseness subjected Ocheltree to a hostile work environment that violated Title VII and the *Meritor Savings Bank* line of cases. *See ante* at 8-9. While the majority does point out that some of the workplace antics were focused more directly on Ocheltree than others to obtain her reaction as a woman, the number of such incidents appears to be limited to three. *See ante* at 9-10. The remainder of the conduct relied on by the majority must be characterized as general work conditions that both males and Ocheltree experienced. The majority fails to explain how these generally coarse conditions discriminated against one person or against one sex.

The dissenting opinion has, in my judgment, advanced the proper analysis of Title VII, focusing on *discrimination* and pointing out that the generally ugly atmosphere, albeit normally unacceptable, did not violate Title VII because these general conditions did not discriminate. *See post* at 22. For these reasons noted by the dissent, I cannot agree with the majority's analysis.

I am still left, however, with the existence of the three incidents of which both the majority and the dissenting opinion agree were focused on Ocheltree because

she was a woman. These three incidents taken in isolation, without any offensive background conduct, most likely were insufficiently pervasive to alter the terms and conditions of Ocheltree's workplace. *See Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996) (holding that a few sexually discriminatory incidents "spread over seven years with significant time gaps between incidents" was not sufficiently severe or pervasive to be actionable). But the presence of the background conduct based on sexual perversion leads me to believe that we cannot take the three incidents in isolation. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts per- formed"). The discriminatory impact of the three incidents in my judgment was heightened by the force of the sexually-based back-ground conduct, and therefore, on reflection, I believe that a jury could legally find that Ocheltree was the victim of unlawful discrimination.

Thus, while I firmly concur in the dissenting opinion's interpretation of Title VII, my review of the facts in the peculiar circumstances of this case leads me to conclude that the jury's verdict on liability should be affirmed. For this reason, I concur only in the judgment.

With respect to punitive damages, I agree that they must be vacated.

WILLIAMS, Circuit Judge, dissenting in part and concurring in the judgment in part:

In all candor, I share with my colleagues the personal preference that all people treat each other with respect and decency, in and out of the workplace. My

disagreement with the result reached by the majority should in no way be interpreted as condoning the deplorable behavior exhibited by the employees of Scollon Productions. The question, I submit, is whether we, as federal judges, should devise our own policy or follow that which was clearly expressed by Congress in Title VII. The answer is clear: "[o]ur compass is not to read a statute to reach what we perceive — or even what we think a reasonable person should perceive — is a `sensible result'; Congress must be taken at its word unless we are to assume the role of statute revisers." *Bifulco v. United States*, 447 U.S. 381, 401 (1980) (Burger, J., concurring). "Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done." *Id.* at 402 (citing *The Spirit of Liberty: Papers and Addresses of Learned Hand* 306-307 (Dilliard ed. 1960)). Congress has proscribed gender-motivated *discrimination* in the workplace, not immorality, vulgarity, or disrespect. With all respect to my esteemed colleagues, I cannot agree that this jury verdict can be sustained by simply recounting various types of vulgarity and then concluding *ipse dixit* that such behavior constituted gender-motivated discrimination. Because I believe the majority's opinion reflects a fundamental misconception of the meaning of "discriminat[ion] . . . because of . . . sex" and effectively insulates the district court's denial of the motion for judgment as a matter of law from meaningful appellate review, I respectfully dissent from the majority's decision to affirm the compensatory damages award. I concur in the majority's judgment that the punitive damages award must be reversed.

I.

A court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury

to find for that party on that issue." Fed. R. Civ. P. 50(a)(1); *see also Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000) ("[Rule 50(a)] allows the trial court to remove cases or issues from the jury's consideration when facts are sufficiently clear that the law requires a particular result." (internal quotation marks and citation omitted)). "While we are compelled to accord the utmost respect to jury verdicts and tread gingerly in reviewing them, we are not a rubber stamp convened merely to endorse the conclusions of the jury, but rather have a duty to reverse the jury verdict[ ] if the evidence cannot support it." *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996) (internal citations omitted). "Judgment as a matter of law is proper when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." *Id.* at 1249 (internal quotation marks and citation omitted).

II.

To determine whether there is a legally sufficient evidentiary basis to sustain the jury's verdict, I begin with the text of Title VII. Title VII makes it an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . .sex." 42 U.S.C.A. § 2000e-2(a)(1) (West 1994). Because the work-place environment is one of the "terms, conditions, or privileges of employment," *see Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-67 (1986), a plaintiff may establish a violation of Title VII by proving that "discriminat[ion] . . . because of . . . sex" has created a hostile or abusive work environment, *see id.* at 66. As the majority explains, to make out a hostile work environment claim, the claimant must prove: (1) that the subject conduct was unwelcome; (2) that the plaintiff was "discriminate[d] against . . . because of [her] sex"; (3) that the gender-

motivated discriminatory behavior was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer. (Maj. Op. at 8.) Scollon Productions contends that the evidence was insufficient with respect to elements (2), (3), and (4). I will address elements (2) and (3) in turn.

A.

Notably, "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at `*discriminat[ion]* . . . because of . . . sex.'" *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 676 (7th Cir. 1993) (noting that there would be no cause of action for race discrimination under Title VII for a "daily routine of race-neutral verbal abuse"). Thus, a pervasively hostile or abusive atmosphere does not create a cause of action for sexual harassment under Title VII unless the plaintiff is able to show discriminatory treatment because of sex. *Meritor Sav. Bank*, 477 U.S. at 66 ("[C]ourts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."). "[W]orkplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations." *Oncale*, 523 U.S. at 80. "`The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Stated another way, "would the complaining employee have suffered the harassment had he or she been of a different gender?" *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 750 (4th Cir.

1996) (quoting *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981)).

Based upon the foregoing principles, this court has consistently and correctly recognized that a finding of "discriminat[ion] . . . because of . . . sex" depends not simply on identifying some quantum of harassing behavior to which an individual is exposed. Rather, the statutory language itself requires a showing that the harassing behavior constituted disparate treatment and that this disparate treatment was motivated by the plaintiff's gender. *See Lack v. Wal-Mart, Inc.*, 240 F.3d 255, 260 (4th Cir. 2001) ("This emphasis on discrimination as *sex-differential treatment* resonates throughout . . . *Oncale*." (emphasis added)); *id.* at 261 (asking whether offensive comments were "animated by Bragg's hostility to Lack as a man"). In other words, there must be evidence that supports an inference that the harassing conduct is both "discriminat[ion]" and is "because of . . . sex." *See Oncale*, 523 U.S. at 80-81; *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 242 (4th Cir. 2000) ("An employee is harassed or otherwise discriminated against `because of' his or her gender if, `but for' the employee's gender, he or she would not have been the victim of the discrimination." (citing *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996)).

Applying these principles here, I turn first to the question of whether the vulgar talk and antics detailed by the majority amounted to discrimination. With respect to the vast majority of vulgar talk and behavior upon which the majority relies, there is no suggestion that Ocheltree was subjected to any different treatment than that to which the other workers in the production shop were subjected. Tellingly, of the eleven men who worked in the production shop, three of them — Steve Zouras, John Riddle, and Brian Hodge — were offended by, and also complained about, the

talk and behavior.[1] There is simply no evidence that Ocheltree was the "individual target" of the vulgar talk and behavior, as is suggested by the majority. (Maj. Op. at 9.) Indeed, giving Ocheltree the benefit of all reasonable inferences, only a minimal quantum of the vulgar behavior and antics could be perceived as having been aimed at her. For example, the vulgar song was sung directly to Ocheltree, and the book with pictures of pierced male genitalia was shown directly to Ocheltree.[2] (J.A. at 115, 117-18.) Additionally, there was one incident with a mannequin about which Ocheltree testified that could be perceived as having been targeted toward her in particular.[3] Setting aside these three incidents,[4] the remainder of the vulgar talk

---

[1] John Riddle specifically testified that he did not know whether Ocheltree overheard the vulgar talk and did not believe that the talk or behavior was directed at her, and yet he complained about the conduct and language. (J.A. at 273-74, 279-80.)

[2] The evidence shows that several of the men were looking at the book when one of the men took the book and held it up about "four feet away" from Ocheltree and said, "[w]hat do you think about this?" (J.A. at 117.) The uncontested evidence shows that Ocheltree later voluntarily looked at this book "by herself" while on break. (J.A. at 343.)

[3] Although the majority discusses numerous incidents involving simulated sexual acts with mannequins, (Maj. Op. at 3-4), Ocheltree only testified about one such incident, (J.A. at 116-17). From Ocheltree's testimony about this one incident, and giving her the benefit of all reasonable inferences, a jury could conclude that it was staged for her benefit. Brian Hodge, a co-worker of Ocheltree's, testified that employees would regularly simulate sexually explicit acts on mannequins, but there is no legally sufficient evidentiary basis to conclude that Ocheltree was aware of these other incidents. To the extent that Ocheltree was not confronted with the other incidents about which Hodge testified, I question how the incidents could contribute to her hostile work environment claim.

[4] I have assumed arguendo that these three incidents are "discriminat[ion] . . . because of . . . sex." I discuss in the next section why, even accepting that these three incidents satisfy the second element of Ocheltree's claim, the claim nonetheless fails as a matter of law.

behavior cannot reasonably be perceived as having been aimed or directed at Ocheltree in any way. The vast majority of the talk and behavior occurred in group settings as part of the male workers' daily bantering with one another and was overheard or witnessed by Ocheltree. *Cf. Hopkins*, 77 F.3d at 753-54 (finding that the harassing conduct was "often not directed specifically at [the plaintiff]" because "several of the incidents upon which Hopkins relies occurred in group settings"); *White v. Fed. Express Corp.*, 939 F.2d 157, 160 (4th Cir. 1991) (noting that "[m]ost of the racist incidents detailed . . . were not directed against plaintiff . . ." (internal quotation marks omitted)). The uncontested evidence was that Ocheltree overheard most of the sexually explicit conversations because the men in the production shop "had to speak in a loud tone above all the equipment running and everything going." (J.A. at 201). Significantly, Ocheltree testified that Harold Hirsch would "always apologize if he knew [Ocheltree] could hear" what was being said. (J.A. at 146.) Ocheltree also testified that Jason Salvage and Barry Brown, two of the men who regularly engaged in the vulgar talk and behavior, "did not care what they said and to who they said it," (J.A. at 146). Thus, Ocheltree's own testimony confirms that much of the sexual talk and antics were not aimed at her.

My colleagues in the majority acknowledge that men were exposed to and offended by the sexual talk and antics, but they suggest that gender-motivated discrimination may be inferred because "[t]here is no evidence . . . that [the] outrageous conduct was aimed at getting an embarrassed reaction from these men or that it was calculated to generate laughter at the expense of any man." (Maj. Op. at 10.) A review of the evidence, however, belies this assertion. For example, Ocheltree testified about an incident where Harold Hirsch told two male employees that he "would like to have sex with young boys." (J.A. at 119.) According to Ocheltree, this comment was said in front of Steve Zouras, who

responded "that is enough, this cannot go on in here." (J.A. at 119.) Zouras's response immediately provoked laughter from the men. (J.A. at 119.) Thus, the uncontested evidence shows that the men "enjoyed watching and laughing at the reactions" of anyone who was offended by their childish and immature conduct, not that the men "enjoyed watching and laughing at the reactions of the only woman in the shop," (Maj. Op. at 10), as the majority concludes.

At bottom, the majority simply fails to acknowledge the uncontested evidence showing that the vulgar talk and behavior was experienced by, and equally offensive to, all of the production shop workers, irrespective of gender. In light of this evidence, Ocheltree is unable to establish that she was subject to any meaningful difference in treatment when compared to her co-workers. *Lack*, 240 F.3d at 262 ("Lack [a male plaintiff] fails to come to grips with the fact that female employees (including his original co-plaintiff Susan Willis) also lodged similar complaints regarding Bragg's behavior. This fact undercuts Lack's claim to a substantial extent."); *id.* ("In its totality, the evidence compels the conclusion that Bragg was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike."); *SCUSA v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958, 965 (8th Cir. 1999) ("Appellant admitted that Schoenfeld used profanity toward both male and female employees, and she believed that Lonnie would have reacted the same way had a male co-worker laughed at his mistakes."); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (holding that where a supervisor makes sexual overtures to employees of both genders, or where the conduct is equally offensive to male and female workers, the conduct may be actionable under state law, but it is not actionable as harassment under Title VII because men and women are accorded like treatment). Thus, the majority of the vulgar talk and antics trumpeted by the majority did not constitute discrimination.

Moreover, with regard to the second part of this inquiry, there is no evidence that this non-discriminatory vulgar talk and behavior occurred "because of" Ocheltree's sex. In fact, the uncontested evidence before the jury conclusively establishes otherwise. Zouras, who worked at Scollon Productions prior to Ocheltree becoming an employee, testified that "the same kind of conversations went on before [Ocheltree] came to work [at Scollon Productions] as after she arrived" and that it would be "fair to say there was no change in the atmosphere at the shop when [Ocheltree] arrived." (J.A. at 241-42.) Given that the behavior occurred prior to Ocheltree's employment with Scollon Productions, it follows *a fortiori* that the behavior could not have been motivated by her sex.[5]

Finally, my colleagues in the majority suggest that a jury could reasonably infer gender-motivated discriminatory treatment because Ocheltree was harassed "in such sex-specific and derogatory terms . . . as to make it clear that the harasser [was] motivated by general hostility to the presence of women in the workplace." *See Oncale*, 523 U.S. at 80. While I do not condone the vulgar talk that frequently took place at Scollon

---

[5] The majority suggests that the "misconduct worsened as time went on, especially after Ocheltree complained to the men and the shop supervisor, Harold Hirsch." (Maj. Op. at 3, 10.) The uncontested evidence is that any worsening in the conduct was experienced by all employees and that similar complaints were lodged prior to the worsening by Ocheltree's male co-workers. Thus, even viewing the inferences in the light most favorable to Ocheltree, the worsening of the conduct does not establish that Ocheltree was exposed to "disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed." *Oncale*, 523 U.S. at 80 (internal quotation marks and citation omitted). The conduct itself does not amount to gender-motivated discrimination; thus, the simple fact of its worsening cannot convert the otherwise vulgar but lawful conduct into "discriminat[ion] . . . because of. . . sex."

Productions, I disagree that it could reasonably be perceived as so "sex-specific and derogatory" as to give rise to an inference of gender-motivated discriminatory treatment. At the outset, I note that the lewd, vulgar remarks had nothing to do with the presence of women in the workplace. The conversations about the men's sexual exploits simply described – albeit in graphic and lewd terms – heterosexual sex, including oral sex, between consenting adults.

Oncale specifically instructs that comments do not amount to discriminatory sexual harassment simply because of their sexual content. *Oncale*, 523 U.S. at 80 (explicitly rejecting the proposition that harassment directed at plaintiff with sexual content automatically constitutes discrimination because of sex). On their face, the comments do not portray women in any negative or demeaning light. The sexual behavior described by the male co-workers is not by definition passive or subservient. Significantly, the comments do not suggest any abuse, control, or the use of force; the men were simply bragging about the sexual prowess of their partners. Further, in modern times, there is nothing particularly derogatory, demeaning, or subservient about a woman participating in consensual heterosexual sex. As women have sought and achieved sexual equality in this society, and as moral beliefs and taboos about oral sex have broken down, it seems illogical to assert that comments about consensual sex between adults necessarily imply male dominance or power.

To be sure, sexually explicit conversations could be so sex-specific and derogatory as to permit an inference of gender-related hostility. For example, if the conversations included unambiguous gender-related epithets, it would be permissible to infer that the vulgar behav- ior was intended to be discriminatory and was animated by hostility toward women. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th

Cir. 2001). No such conversations, however, were alleged here. Apart from the sexual content of the conversations, there is no nexus whatsoever between the conduct and Ocheltree's gender. To conclude that these conversations portray women in derogatory terms simply because they depict women engaging in consensual heterosexual sex would be, I believe, to misapply the Supreme Court's teaching on the relationship between sexual conversations and sexual harassment and to misunderstand modern societal views regarding women's sexuality. "[W]hile there are still people in this country, male as well as female, who are deeply offended by dirty words, employers are not under a legal duty enforceable by suits under Title VII to purify the language of the workplace." *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1010 (7th Cir. 1994) (citing *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620-21 (6th Cir. 1986)).

In sum, after applying the appropriate analytical framework, it is clear that there is no legally sufficient evidentiary basis upon which the jury could have concluded that the majority of vulgar talk and behavior that took place at Scollon Productions amounted to gender-motivated discriminatory treatment.[6] Assuming *arguendo* that the three

---

[6] Given the absence of a sufficient basis for concluding that this vulgar talk and behavior constituted gender-animated discriminatory treatment, the analysis and result crafted by the majority creates a rule requiring that women be given preferential accommodation in the workplace beyond non-discrimination. I view this as contrary to Title VII's statutory demand of equality, as well as contrary to the Supreme Court's and this court's instruction on gender neutrality in employment decisions. Moreover, I reject the notion that female workers are in need of "the protection of a preferential standard." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir. 1995) (Jones, J.); *see also Radtke v. Everett*, 501 N.W.2d 155, 167 (Mich. 1993) ("The belief that women are . . . in need of a more protective standard . . . degrades women and is repugnant to the very ideals of equality that [employment discrimination law] is intended to protect."); Margaret Talbot, *Men Behaving Badly*, N.Y. Times Magazine, October 13, 2002, at 52-55 (opining that a hostile work environment

incidents that could be perceived as having been directed at Ocheltree (e.g., the vulgar song, the body piercing book, and the mannequin incident) amounted to gender-motivated discrimination, I next proceed to determine whether there is a legally sufficient evidentiary basis to support Title VII's third requirement for establishing a hostile work environment claim.

B.

The third requirement for a Title VII claim is proof that the dis- crimination is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Sav. Bank*, 477 U.S. at 67 (internal quotation marks omitted; alteration in original). "Not all sexual harassment that is directed at an individual because of his or her sex is actionable." *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 772-73 (4th Cir. 1997) (citation omitted). "The `occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers' would be neither pervasive nor offensive enough to be actionable. The workplace that is action- able is the one that is `hellish.'" *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) (quoting *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995)).

The behavior here falls well short of that mark. As discussed above, the vast majority of the vulgar talk and behavior that occurred at Scollon Productions does not constitute "discriminat[ion] . . . because of . . . sex." Of course, it is inappropriate to evaluate the severity or pervasiveness of non-discriminatory conduct for purposes

---

framework that is grounded in the assumption that the "presence of sexuality in the workplace, however motivated, is inherently threatening to women and prevents them from enjoying their work and succeeding on the same basis as men . . . offers a paternalistic view of women as paradigmatic victims in need of protection from all forms of sexual expression").

of imposing liability under Title VII. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998) ("[W]hether an environment is sufficiently hostile or abusive is determined by looking at all the circumstances, including the frequency of the *discriminatory conduct*; *its* severity; whether *it* is physically threatening or humiliating, or a mere offensive utterance; and whether *it* unreasonably interferes with an employee's work performance." (emphasis added and internal quotation marks omitted)); *see also Hartsell*, 123 F.3d at 772 (isolating gender-motivated discriminatory conduct and then evaluating whether such conduct was severe or pervasive). Even assuming that the few incidents that could be viewed as having been directed at Ocheltree during the year and a half that she was employed at Scollon Productions each amounted to gender-motivated discrimination, I have no difficulty concluding that these incidents were not severe or pervasive for purposes of Title VII as a matter of law. *See, e.g., Hartsell*, 123 F.3d at 773 ("But the claims propounded by Hartsell—even assuming them all to be true—are so trivial, so isolated, and so far from the paradigmatic case of sexual harassment, that summary judgment was clearly appropriate."); *Hopkins*, 77 F.3d at 754 (listing cases involving infrequent, isolated incidents in which we have held that harassment was not severe or pervasive as a matter of law). Because Ocheltree has failed to introduce sufficient evidence establishing the third element of her hostile work environment claim, the claim is not cognizable as a matter of law.[7]

---

[7] Because I conclude that the gender-based conduct was not sufficiently severe or pervasive for Ocheltree to establish a prima facie case of sexual harassment under Title VII, I do not reach the questions of whether the conduct could be imputed to Scollon Productions or whether Scollon Productions is entitled to operation of the *Faragher/Ellerth* affirmative defense. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Moreover, insofar as Ocheltree failed to establish the essential elements of a sexual harassment claim, I concur with the portion of the judgment that reverses the district court's denial of Scollon Productions' motion to set aside the jury's award of punitive damages.

In my good colleague Judge Niemeyer's separate opinion, he agrees, as he did initially as a member of the panel, that these three incidents, taken in isolation, were not severe or pervasive as a matter of law. He further agrees that virtually all of the vulgar talk and antics relied upon by the majority cannot reasonably be viewed as gender- motivated discrimination. Nevertheless, he now finds that the three incidents that arguably were directed at Ocheltree could be considered severe or pervasive upon consideration of this background, non-discriminatory conduct. I disagree.

Although it is true that determining the severity or pervasiveness of the gender-motivated discrimination requires careful consideration of the social context in which particular behavior occurs, *Oncale*, 523 U.S. at 81-82; *Meritor Sav. Bank*, 477 U.S. at 69, this contextual analysis weakens — rather than bolsters — Ocheltree's sexual harassment claim. For example, it is not severely or pervasively abusive for a coach to smack a professional football player on the buttocks as he heads on the field, "even if the same behavior would reasonably be experienced as abusive by the coach's secretary . . . back at the office." *Oncale*, 523 U.S. at 81. Similarly, the three isolated incidents of gender-motivated discrimination were not severe or pervasive, considering the coarse social context of the production shop where the background environment was and had been generally crude and vulgar, but non-discriminatory. *See Gross v. Burggraf Construction Co.*, 53 F.3d 1531, 1537-39 (10th Cir. 1995) (evaluating claim of gender discrimination in light of the profanity and vulgarity prevalent in "the real world of construction work").

A contrary conclusion would eviscerate the purpose underlying the severe or pervasive requirement by allowing sporadic instances of gender-motivated discrimination to give rise to Title VII liability. *See Faragher*, 524 U.S. at 788. If

non-discriminatory background conduct can somehow transform isolated incidents of discrimination into a severe and pervasive environment, its practical effect mirrors that of the majority -- to avoid Title VII liability, employers will be forced to alter the workplace environment by eliminating the background, non-discriminatory conduct. When a non-discriminatory workplace environment is required to change because of the introduction of a female employee, Title VII has become a code of civility that requires that women be afforded preferential treatment beyond non-discrimination. I cannot agree that Title VII permits or sanctions such a result.

III.

Finding that there is not a legally sufficient evidentiary basis to support the jury's verdict, I respectfully dissent from my colleagues' decision to affirm the compensatory damages award. I concur in the majority's judgment that the punitive damages award must be reversed.

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LISA L. OCHELTREE,
Plaintiff-Appellee,

v.
No. 01-1648

SCOLLON PRODUCTIONS,
INCORPORATED,
Defendant-Appellant.

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Matthew J. Perry, Senior District Judge.
(CA-96-1215)

Argued: April 2, 2002
Decided: October 10, 2002
[Entered: October 10, 2002]

Before NIEMEYER, WILLIAMS, and MICHAEL,
Circuit Judges.

Reversed and remanded with instructions by published opinion. Judge Williams wrote the opinion, in which Judge Niemeyer joined. Judge Michael wrote an opinion dissenting in part and concurring in the judgment in part.

COUNSEL

ARGUED: Charles Franklin Thompson, Jr., TALLEY, MALONE, THOMPSON & GREGORY, Columbia, South Carolina, for Appellant. William Elvin Hopkins, Jr., M'CUTCHEN, BLANTON, RHODES & JOHNSON, L.L.P., Columbia, South Carolina, for Appellee. **ON BRIEF:** Michael D. Malone, TALLEY, MALONE, THOMPSON & GREGORY, Columbia, South Carolina, for Appellant.

OPINION

WILLIAMS, Circuit Judge:

Lisa L. Ocheltree filed this action against her employer, Scollon Productions, Incorporated (Scollon Productions), alleging sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e (West 1994 & Supp. 2001). Following a jury trial, Ocheltree was awarded a substantial amount in compensatory and punitive damages. Scollon Productions appeals the district court's denial of its motion for judgment as a matter of law. Because we agree that "there is no legally sufficient evidentiary basis" for the jury's verdict, Fed. R. Civ. P. 50(a)(1), we reverse and remand with instructions for the district court to enter judgment in favor of Scollon Productions.

I.

A.

Scollon Productions is in the business of creating costumes for various characters and mascots, such as the South Carolina Gamecock mascot.[1] Bill Scollon (Scollon) began the company 31 years ago and is the President, and Ellery Locklear is the Vice-President. The company

---

[1] As an appeal from the denial of judgment as a matter of law, we view the facts and any inferences in the light most favorable to Ocheltree, the non-moving party.

currently employs approximately 50 people and is operated from a plant that is located in White Rock, South Carolina. Ocheltree was employed in the production shop of the plant from February 1994 until her discharge in August 1995.

Ocheltree testified to numerous incidents of offensive behavior during her employment at Scollon Productions.

According to Ocheltree, some of the primarily male staff engaged in open conversations about sex, made comments about the sexual habits of others on the staff, used foul, vulgar, and profane language, and told sexually-oriented jokes. Ocheltree also testified about specific incidents that occurred during her employment, including an incident when she witnessed employees pretending to perform oral sex and other sexual acts on a mannequin, another incident when employees showed Ocheltree a picture of pierced male genitalia and asked her what she thought about it, and finally, an incident when a co-worker sang her a song in which the lyrics were "come to me, oh baby, come to me, your breath smells like cum to me." (J.A. at 114-15.) According to Ocheltree's testimony, the shop supervisor, Harold Hirsch, showed a photograph of a nude woman around the shop and engaged in several sexually explicit conversations with Ocheltree's male coworkers.

Brian Hodge, a former employee of Scollon Productions, corroborated portions of Ocheltree's testimony, stating that there was a good deal of "vulgar language and vulgar attitude throughout the shop," and that this type of conduct happened "every day." (J.A. at 199-200, 204.) He also testified to overhearing employees discuss sexual acts and witnessed employees simulate sexually explicit acts on mannequins.

Hodge stated that Hirsch was often present during these discussions and conduct, had participated in some of the discussions, and had once made a sexually explicit comment. Hodge testified that he recalled a safety meeting attended by Hirsch wherein Ocheltree let it be known that she was offended by the conduct and that she wanted the language and the conduct to stop immediately. Hodge testified that he "speculated" that the men engaged in some of the behavior to "bother[ ]" Ocheltree, and that the behavior got worse after Ocheltree complained. (J.A. at 202-03.)

According to Ocheltree, she attempted to speak to Scollon and Locklear about the work environment on different occasions, but she was never given the opportunity to meet with either. On at least one occasion, Scollon told her that he did not have time to meet with her and instructed her to speak to Locklear. On another occasion, when Locklear was on the telephone, Ocheltree wrote him a note stating that she needed to speak with him, but she did not indicate what she needed to speak with him about. Locklear testified that after he concluded his conversation, he attempted to speak to Ocheltree about the note, but he could not find her because she was not at her work station. He made no further attempts to follow up with her; nor did Ocheltree make any further attempts to speak with Locklear or Scollon. In 1995, after approximately 18 months with Scollon Productions, Ocheltree was discharged for excessive absenteeism, excessive use of the telephone during working hours, and because her husband had threatened physical violence against Locklear.

B.

On April 25, 1996, Ocheltree filed a complaint against Scollon Productions in the United States District Court of South Carolina, alleging sexual harassment and violations of South Carolina state law. Following a report and recommendation by a magistrate judge, the district court granted Scollon Productions's motion for summary judgment on all claims. In his report and recommendation, the magistrate judge found that there was no basis for imposing liability on Scollon Productions because neither Scollon nor Locklear, who were the only two members of the corporation active in day-to-day management, were aware of or should have known of the offending activity. The district court concluded that Ocheltree failed to object to the finding that neither Scollon nor Locklear knew of the offending activity, adopted the magistrate judge's recommendation, and granted summary judgment to Scollon Productions. Ocheltree filed a pro se appeal with this court.

Following briefing on the appeal, the Supreme Court issued its opinions in *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), which held that an employer is vicariously liable for a hostile work environment created by a supervisor, subject to an affirmative defense that allows the employer to avoid strict liability for one employee's sexual harassment of another.[2] *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

---

[2] To be entitled to the affirmative defense, the employer must first show that no adverse tangible employment action was taken. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. If this preliminary requirement is met, then the company must prove that it exercised reasonable care in preventing and promptly correcting any sexually harassing behavior. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. It also must show that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

Based upon *Faragher* and *Ellerth*, we vacated the district court's judgment as to the hostile work environment claim and remanded. *Ocheltree v. Scollon*, 161 F.3d 3, 1998 WL 482783 (4th Cir. Aug. 11, 1998). We affirmed the district court's dismissal of Ocheltree's state law claims because Ocheltree failed to preserve those issues on appeal. *Id.*

Upon remand, Scollon Productions filed three separate motions for summary judgment, each of which was denied by the district court. After the jury returned a special verdict in favor of Ocheltree for $7,280.00 in compensatory damages and $400,000 in punitive damages, Scollon Productions filed a motion for judgment as a matter of law, requesting the district court to set aside the jury verdict, or, in the alternative to reduce the damages award based upon the statutory cap on punitive and compensatory damages in 42 U.S.C.A § 1981a(b)(3) (West 1994 & Supp. 2001). The district court denied the motion to set aside the jury verdict but reduced the punitive and compensatory damages award to a total of $50,000 pursuant to § 1981a(b)(3)(A). Scollon Productions filed a timely notice of appeal.

II.

We review de novo a district court's denial of a Rule 50 motion for judgment as a matter of law, viewing the evidence in the light most favorable to the non-moving party. *See, e.g., Chaudhry v. Gallerizzo*, 174 F.3d 394, 404-05 (4th Cir. 1999). A court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. Proc. 50(a); *see also Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000). "While we are compelled to accord the utmost respect to jury verdicts and tread gingerly in reviewing them, we are not a rubber stamp convened merely to endorse the conclusions of the jury, but rather have a duty

to reverse the jury verdict[ ] if the evidence cannot support it." *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996) (internal citations omitted). "Judgment as a matter of law is proper when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." *Id.* at 1249 (internal quotation marks omitted).

Title VII makes it an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C.A. § 2000e-2(a)(1). Because the work-place environment is one of the "terms, conditions, or privileges of employment," *see Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 64-67 (1986), Title VII creates a cause of action in favor of persons forced to work in a hostile workplace, *see id.* at 66 (establishing "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment"). To establish sexual harassment based upon a hostile or abusive work environment, a plaintiff is required to prove four elements: "(1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer." *Spicer v. Virginia*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc); *Brown v. Perry*, 184 F.3d 388, 393 (4th Cir. 1999). Scollon Productions contends that the evidence was insufficient with respect to elements (2), (3), and (4). We need only address elements (2) and (3).

A.

"Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at `discriminat [ion] . . . because of . . . sex.'" *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998). In evaluating the "because of" prong, this court has noted that Title VII was not intended to reach "dirty jokes or sexually-based profanity spoken by a male supervisor to other male employees." *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 (4th Cir. 1996). We have further explained "that in prohibiting sex discrimination solely on the basis of whether the employee is a man or a woman, Title VII does not reach discrimination based on other reasons, such as the employee's sexual behavior, prudery, or vulnerability." *Id.* at 751; *see also McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996) (refusing to recognize a Title VII hostile work environment claim for discrimination "`because of' [the harasser's] vulgarity and insensitivity and meanness of spirit"), *abrogated on other grounds by Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998). As we held in *Hopkins*, the critical issue in evaluating Title VII's "because of" prong is: "[W]ould the complaining employee have suffered the harassment had he or she been of a different gender?" *Hopkins*, 77 F.3d at 750 (quoting *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981)); *cf. Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

With respect to the vast majority of offensive conduct upon which Ocheltree relies, the uncontested evidence demonstrates conclusively that Ocheltree would have been exposed to the same atmosphere had she been male. Of the catalogued offensive behavior, only three

incidents were directed toward Ocheltree – the vulgar song, the body- piercing magazine, and the sexual acts with the mannequin.[3] Theremainder of the conduct occurred in group settings as part of the male workers' daily bantering toward one another and was overheard or witnessed by Ocheltree. *Cf. Hopkins*, 77 F.3d at 754 ("several of the incidents upon which Hopkins relies occurred in group settings"); *White v. Federal Express Corp.*, 939 F.2d 157, 160 (4th Cir. 1991) ("Most of the racist incidents detailed . . . were not directed against plaintiff . . . ."). Moreover, the

---

3 While Scollon Productions argues that the mannequin incident was not directed at Ocheltree, there was evidence suggesting that it was staged for her benefit and that, after she expressed her disgust, the men began laughing. Thus, drawing all inferences in Ocheltree's favor, we accept that the incident was directed at Ocheltree.

The dissent also points to an incident directed at Ocheltree by Locklear, in which Locklear allegedly stated that Ocheltree should "go home and be a housewife." (J.A. at 129); *post* at 25. The dissent states, "[a] jury could reasonably see this as another piece of evidence suggesting that Ocheltree experienced harassment because of her sex." *Post* at 25. This suggestion is misplaced, in that Ocheltree's Title VII action was based upon alleged harassment by her coworkers in the shop and by Hirsch; she did not claim at trial or on appeal any harassment by Locklear or Scollon – Scollon's Vice President and President – and the jury did not find any such harassment. (J.A. at 444) (special verdict form stating "[q]uestions relating ONLY to action of Mrs. Ocheltree's *co-workers in the shop*" (emphasis added)); (J.A. at 446 ("[q]uestions relating ONLY to the Actions of Harold Hirsch"). The dissent states that because Locklear was a corporate officer, his "actions are relevant to the ultimate question of whether Scollon Productions can be held liable to Ocheltree for the creation of a hostile work environment." *Post* at 26 n.3. Whether the subject conduct can be imputed to Scollon Productions, however, is a separate issue from whether Ocheltree experienced harassment because of her sex. In any event, consideration of Locklear's comment would not materially alter our analysis, particularly in light of the context in which the comment was made. Ocheltree testified, "He said, `You always have an excuse, I don't care if someone is dying in your family, you are not to be on the phone and you must be here at work.' He also told me that if I didn't like it there that I ought to go home and be a housewife, that maybe I am not cut out to be here, to be at this job." (J.A. at 129.)

uncontested evidence demonstrated that the men's behavior did not begin or change as of the date Ocheltree began working with Scollon Productions but had been ongoing before she came to work for Scollon Productions.[4] (J.A. at 241-42); *cf. Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) (court may consider "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs" (internal quotation marks omitted)).

Additionally, setting aside the incidents involving the mannequin and the vulgar song, there was no evidence demonstrating that the offensive behavior that occurred in Ocheltree's presence was gender-related. The discussions certainly were sexually explicit, including the discussion regarding the body-piercing magazine, and while they were generally degrading, humiliating, and even insulting, they were not aimed solely at females in any way. *Compare Oncale*, 523 U.S. at 80 ("We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."); *Lack v. Wal-Mart, Inc.*, 240 F.3d 255, 258 (4th Cir. 2001)

---

[4] The dissent points to testimony by Hodge and Ocheltree wherein each stated that the atmosphere seemed to become "increasingly coarse" throughout their employment at Scollon Productions. *Post* at 24 & n.2. As the dissent notes, however, Hodge began working at Scollon Productions "several months after Ocheltree began working there," *post* at 24; thus, neither Ocheltree nor Hodge could offer probative evidence regarding the atmosphere at Scollon Productions prior to Ocheltree's employment. Additionally, insofar as Hodge's and Ocheltree's testimony supports a finding that the atmosphere at Scollon Productions became more crude during Ocheltree's employment than it was as of the date she was hired there is no evidence, however, that the behavior worsened or became more crude because of Ocheltree's gender. *See infra* at 11. Without such evidence, the simple fact that the behavior worsened cannot support the jury's verdict.

(overturning a jury verdict for lack of evidence supporting the "because of" prong where the supervisor regularly told sexually explicit jokes, used sexually vulgar language, and generally had an "unabashed taste for lewd humor"), *with Smith v. First Union Nat'l Bank*, 202 F.3d 234, 242 (4th Cir. 2000) ("A work environment consumed by remarks that intimidate, ridicule, and maliciously demean the status of women can create an environment that is as hostile as an environment that contains unwanted sexual advances."). Ocheltree conceded that the conduct was equally offensive both to men and women. Two of Ocheltree's male coworkers, Steve Zouras and John Riddle, complained to management about the other workers' behav ior. *Cf. Lack*, 240 F.3d at 262 ("Lack fails to come to grips with the fact that female employees (including his original co-plaintiff Susan Willis) also lodged similar complaints regarding Bragg's behavior. This fact undercuts Lack's claim to a substantial extent."); *id.* ("In itstotality, the evidence compels the conclusion that Bragg was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike.").

Ocheltree testified that there was never any suggestion that she engage in sexual relations with anyone at the plant that she was not frightened by any of the behavior, that nobody touched her in a sexual or threatening manner, and that none of the comments were related in any manner to her appearance. (J.A. at 147); *cf. Hartsell v. Duplex Prod., Inc.*, 123 F.3d 766, 773 (4th Cir 1997) ("There is no allegation that Hartsell was inappropriately touched, propositioned, flirted with, taunted, or even ogled."). Also of significance is the fact that the vulgarities alleged here, including "mother f----r," "faggot," "d--k head," "p-ssy," "blow job," and "ass," (J.A. at 35-36), are not "unambiguous [gender] epithet[s]," *Spriggs v. Diamond Auto Glass, Inc.*, 242 F.3d 179, 185 (4th Cir. 2001), such that it would be reasonable to assume that they were animated by gender

bias.[5] The dissent disputes this final point, claiming that many of the sexually-explicit conversations portray women as "sexually subordinate" to men. *Post* at 28. We cannot agree that the evidence supports such a characterization; the conversations simply depict— in graphic and crude terms — heterosexual sex, including oral sex. Indeed, the conversations depict the sexual prowess of females at least to the same extent as they do males.

To demonstrate that the harassment was directed at her because of her gender, Ocheltree relies upon the testimony of Hodge, in which he stated that he believed the men acted the way they did to "bother" Ocheltree. (J.A. at 202.) Hodge conceded, however, that his testimony regarding the motivation for the conduct was pure speculation.[6] Additionally, even if the alleged harassers were intending to bother Ocheltree, there is no evidence that those participating in the offensive conduct were attempting to bother her *because of her gender*. On the evidence presented, the jury would not be permitted to make the inferential leap that Ocheltree's gender motivated the men's offensive behavior. As noted above, the uncontroverted evidence demonstrated that the men engaged in the same type of behavior before Ocheltree began working at Scollon Productions, continued to engage in the behavior around the other men while Ocheltree worked there, and that several other men found the behavior equally offensive.

---

5 The fact that some of the vulgarities are profane references to each gender's various body parts does not render them inherently abusive or disparaging on account of gender. If that were true, sexually explicit conversations involving obscene terms would invariably constitute gender-related discrimination, a result that we have rejected. *Lack v. Wal-Mart, Inc.*, 240 F.3d 255, 262 n.8 (4th Cir. 2001) ("Facially sexual remarks must be evaluated according to their common usage—however vulgar the usage may be.").

Hodge also testified that the behavior worsened after Ocheltree complained about the behavior at a meeting, which Ocheltree contends is evidence that the sexually explicit behavior was motivated by gender. Notably lacking, however, was evidence demonstrating that after Ocheltree complained, the offensive behavior worsened only toward her, as opposed to worsening toward all employees. Indeed, from Hodge's testimony, one can only conclude that the behavior worsened for all employees and was equally offensive to men and women alike. Accordingly, giving Ocheltree the benefit of all permissible inferences, none of the offensive behavior catalogued by Ocheltree was directed at her because of her gender, save the vulgar song and the simulated sex with the mannequin, which arguably could be construed as gender-related harassment, in that both could be per ceived as particularly demeaning towards women or as veiled sexual propositions. Assuming, without deciding, that these two incidents constitute gender-related harassment, we next consider whether the incidents were so severe or pervasive as to have altered the terms of Ocheltree's employment.

B.

In analyzing the third element of a hostile work environment claim, this court has emphasized that "[n]ot all sexual harassment that is directed at an individual because of his or her sex is actionable." *Hartsell*, 123 F.3d at 772 (internal quotation marks omitted). "The occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers would be neither pervasive nor offensive enough to be actionable. The workplace that is actionable is the one that is hellish." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) (internal quotation marks and citation omitted).

When presented in other Title VII cases with the type of isolated, scattered incidents that are at issue here, we repeatedly have held that the conduct was not sufficiently severe or pervasive as a matter of law. *See, e.g., Hartsell*, 123 F.3d at 773 ("But the claims propounded by Hartsell – even assuming them all to be true – are so trivial, so isolated, and so far from the paradigmatic case of sexual harassment, that summary judgment was clearly appropriate."); *Hopkins*, 77 F.3d at 754 (listing cases involving infrequent, isolated incidents in which we have held that harassment was not severe or pervasive as a matter of law). Thus, we have no difficulty concluding that the two arguably gender-related incidents directed at Ocheltree during the year and a half that she was employed at Scollon Productions were not severe or pervasive for purposes of Title VII. Having failed to introduce sufficient evidence establishing the third element of Ocheltree's hostile work environment claim, the claim is not cognizable as a matter of law. Accordingly, the district court erred by refusing to grant judgment as a matter of law in favor of Scollon Productions.[7]

C.

The dissent agrees that the gender-based conduct identified in Part A is insufficient, as a matter of law, to create a hostile or abusive work environment under this circuit's jurisprudence. *Post* at 22. The dissent further agrees "that much of the sexual talk Ocheltree heard – vulgar though it may be – cannot be seen as disproportionately demeaning to women." *Post* at 33-34. The dissent concludes,

---

[7] Because we conclude that the gender-based conduct was not sufficiently severe or pervasive for Ocheltree to establish a prima facie case of sexual harassment under Title VII, we do not reach the questions of whether the conduct could be imputed to Scollon Productions or whether Scollon Productions is entitled to operation of the *Faragher/Ellerth* affirmative defense. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

however, that "Ocheltree's coworkers' constant descriptions of their sexual exploits, including their near-obsessive interest in discussions of oral sex," *post* at 34, constitute gender-based harassment and that, upon considering these conversations, the evidence was sufficient to support the jury's verdict. In so concluding, the dissent relies principally upon the shock value of the salacious conduct.[8] However well-intentioned the dissent's analysis may be, it ignores or substantially discounts controlling circuit and Supreme Court Title VII jurisprudence and relies upon a number of flawed premises, warranting a somewhat extended response.

The crux of the dissent's analysis relies on the premise that "[c]ourts have . . . recognized that harassing conduct can be `because of sex' even when the conduct `is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex.'" *Post* at 31 (quoting *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991)). It then states that a Title VII plaintiff can demonstrate that conduct is gender-based by showing that the "environment was more hostile to her because of her sex than it would have been to a man." *Post* at 32. Despite the dissent's protestations to the contrary, such an analytical framework defines "discriminat[ion] . . . because of . . . sex" exclusively by reference to the potential unintended effects of offensive conduct on a particular gender, without regard to the motivation for, or intent underlying, the offensive

---

[8] The dissent states that a detailed recitation of every aspect of the crude and offensive behavior that took place at Scollon is necessary to a proper analysis. *Post* at 23. It then goes on, however, to conclude that "much of" the detailed behavior cannot be viewed as gender-based discrimination in this case. *Post* at 33. Thus, one questions whether the detailed description genuinely is required for a proper legal analysis.

conduct.[9] Whatever merit this approach might have, it is not diametrically opposed to the construction that has been given to the phrase "discriminat [ion] . . . because of . . . sex" throughout Title VII sexual harassment jurisprudence.[10] *Oncale*, 523 U.S. at 79, 80 (examining the question of what "discriminat[ion] . . . because of . . . sex" means and focusing on the harasser's motivation for the offensive conduct, and

---

9 Title VII prohibits intentional sex discrimination as well as discrimination that has a disparate impact on a particular sex. Sexual harassment is a "distinct . . .form" of intentional sex discrimination. *DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 437 (7th Cir. 2001); *see also Ellerth*, 524 U.S. at 756 ("Sexual harassment under Title VII presupposes intentional conduct."). Ocheltree litigated this case only as a sexual harassment case and not as a disparate impact case. *DeClue*, 223 F.3d at 437; *supra* at 4.

10 By misapprehending the nature of the "discriminat[ion] . . . because of . . . sex" inquiry, the dissent incorrectly assumes that the question of whether Ocheltree "would have been exposed to the same atmosphere had she been male" is somehow distinct from the question of "`whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Post* at 32 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). As the above-cited cases make clear, however, there is no material difference between the two questions; once the former has been answered in the negative, the latter necessarily also has been answered in the negative. *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) ("An employee is harassed or otherwise discriminated against `because of' his or her sex if, `but-for' the employee's sex, he or she would not have been the victim of the discrimination."); *Hopkins*, 77 F.3d at 750 (opinion of Niemeyer, J.) (citing *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) ("the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender")). Nor can we accept credit for "commit[ting] this court to a course" that focuses on the alleged harasser's motivations rather than the unintended consequences of his actions. *Post* at 36. To the contrary, this course long ago was set out by the Supreme Court and prior panels of this court, and it is our duty to apply the well-established analytical framework to the facts before us, regardless of how unsavory those facts may be.

thus reaffirming that the critical issue is discriminatory intent); *Lack*, 240 F.3d at 261 (asking whether offensive comments were "animated by Bragg's hostility to Lack as a man"); *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 242 (4th Cir. 2000) ("An employee is harassed or otherwise discriminated against `because of' his or her gender if, `but for' the employee's gender, he or she would not have been the victim of the discrimination." (citing *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996)); *Succar v. Dade Co. Sch. Bd.*, 229 F.3d 1343, 1345 (11th Cir. 2000) (reiterating that harassment is "because of" gender only when the harassment is *motivated by* gender); *Green v. Administrators of the Tulane Educ. Fund*, 284 F.3d 642, 659 (5th Cir. 2002) (approving a jury instruction that stated that jury must find that gender was the "but for" cause of the harassing conduct); *Williams v. General Motors, Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) (ruling that a plaintiff must show that "but for the fact of her sex, she would not have been the object of harassment" (citation omitted)); *see also DeClue v. Central Illinois Light Co.*, 223 F.3d 434, 437 (7th Cir. 2001) (discussing distinction between sexual harassment hostile work environment claim and a sexual discrimination disparate impact claim); *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1171-72 (8th Cir. 1996) (affirming a jury instruction that required the jury to find that the harassing acts were intentional and motivated by gender); EEOC Comp. Manual (CCH) §615.2(b)(3) (1987) ("[T]he crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex."); *see generally* David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. Pa. L. Rev. 1697, 1772-74 (2002) (concluding that use of an "effects" test or a disparate impact test, as opposed to a motivation test, is improper when evaluating a sexual harassment claim).

Moreover, the dissent fails to explain persuasively how its analysis comports with that set forth in *Lack*, wherein we explicitly rejected the argument that sexually explicit jokes and sexually vulgar language directed at, and offensive to, both genders constitute discrimination because of sex. *Lack*, 240 F.3d at 258 (addressing a set of sexually vulgar remarks comparable to the type and number of those at issue here); *see also Hopkins*, 77 F.3d at 749 (stating that Title VII does not reach "dirty jokes or sexually-based profanity spoken by a male supervisor to other male employees."). In so holding, we relied on the fact that Lack had not introduced *any* evidence, comparative or otherwise, of gender-based discrimination. *Lack*, 240 F.3d at 262 ("Lack, however, failed to offer such evidence — or any other basis for a jury to conclude that Bragg's conduct was not just sexually tinged harassment, but was instead harassment because of sex."). Accordingly, far from being "a logical extension" of Title VII principles, the dissent's analysis sharply diverges from well established case law in the Supreme Court and in virtually every circuit, including this one.

We do not dispute, of course, that sexually explicit banter can, in some circumstances, constitute gender-based discrimination, but the inquiry is always whether "but for" the plaintiff's gender, the harassment would not have occurred — not whether "but for" the plaintiff's gender, she would have felt discriminated against, irrespective of the harasser's motivation. Ocheltree has presented no legally sufficient evidence demonstrating that her gender motivated the men's sexually explicit conduct and conversations (save, perhaps, the mannequin and vulgar song incidents discussed above, *supra* at 9); i.e., no evidence demonstrating that she would not have been exposed to the same offensive behavior had she been male. Thus, she

has not proven that the sexually explicit behavior upon which the dissent relies constitutes gender-based discrimination.[11]

The dissent's contrary conclusion is premised not only upon an improper analytical framework but also upon an overly rigid view regarding the significance of the fact that the offensive discussions were sexual in content. The dissent would have us adopt a rule that conversations between males about their heterosexual activities in the presence of a female virtually always constitute sex-based harassment because, according to the dissent's characterization, these conversations depict

---

[11] To the extent the dissent would have us rely exclusively on the effects of the offensive behavior that took place at Scollon Productions, it notably avoids discussing the lack of any allegation or evidence that Ocheltree's work or productivity was affected negatively by the conduct or that Ocheltree ever sought to be transferred to another area of Scollon Productions where other women worked. In fact, she testified that, even with consideration of the offensive conduct, she "loved" her job. (J.A. at 114.)

Also significant to any "effects" inquiry is Ocheltree's failure to mention the ongoing harassment to Scollon or Locklear, particularly in light of her previous experience involving a complaint about offensive behavior. In June 1994, shortly after Ocheltree was hired, Steve Zouras, one of Ocheltree's coworkers, reported to Scollon that another employee had told a sexually explicit joke to Ocheltree and that she was offended by the joke. Locklear asked Ocheltree about the incident, and she confirmed it. The offending employee immediately was fired. Ocheltree acknowledged that, from Scollon and Locklear's handling of this complaint, she was aware that Scollon or Locklear would redress her grievance if notified of the behavior. Ocheltree testified that she saw Scollon once a week in the production shop and Locklear more than once a week. Yet, Ocheltree never notified either that the offensive behavior was continuing or worsening. *Supra* at 3-4 (noting that Ocheltree indicated a desire to speak with Scollon and Locklear but never informed either about the nature of her complaint).

women as "sexually subordinate to men."[12] As the Court stated in *Oncale*, however, "[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." *Oncale*, 523 U.S. at 80; *see also id.* at 81 ("[Title VII] does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."). Rather, the motivation for the harassment must be evaluated in light of "the social context in which particular behavior occurs and is experienced by its target." *Id.* at 81. Here, an examination of the relevant context involves an acknowledgment that the offensive conduct took place in a costume production shop where public access is controlled, not a church office, retail shop, bank, or professional office.[13] In fact, were we to adopt the dissent's rhetoric and hold that harassment inevitably is because of sex whenever "a workplace is suffused with representations of women as

---

12 The dissent asserts that it does not suggest that conversations about heterosexual behavior are automatically demeaning to women but that the "tone" and "tenor" of the conversations must be evaluated to determine whether gender-based discrimination exists. Nevertheless, it cites only the frequency and the sexual content of the conversations in support of its conclusion that many of the discussions that took place at Scollon Productions constituted gender-based harassment. *Post* at 34. The dissent seems to suggest a rule whereby a reviewing court would affirm a finding of gender-based discrimination once a certain number of conversations about heterosexual behavior occur in the workplace in the presence of a female. Thus, Title VII would become a workplace code for "gentlemanly conduct" in the presence of women.

13 This fact is significant to a proper contextual analysis because in an environment, like the production shop where public access is controlled offensive behavior among the workers may be more prevalent than it otherwise would be in an environment easily accessible by the public. We do not hold or intimate, as the dissent suggests, that "women in blue collar jobs must put up with conduct that women who work in banks or professional offices need not tolerate." *Post* at 39 n.8.

sexual objects," one wonders how any business that deals routinely with sexually explicit content would escape Title VII liability.

Also incorrect is the assumption pervading the dissent that women are more insulted and demeaned by sexual banter about heterosexual sex, and particularly discussions of oral sex, than are men.[14] This assumption is paternalistic and contrary to Title VII itself. The Fifth Circuit has cautioned against formulating Title VII jurisprudence against the backdrop of such outdated stereotypes, stating:

> A hostile environment claim embodies a series of criteria that express extremely insensitive conduct against women, conduct so egregious as to alter the conditions of employment and destroy their equal opportunity in the workplace Any lesser standard of liability, couched in terms of conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality. In fact, a less onerous standard of liability would attempt to insulate women from everyday insults as if they remained models of Victorian reticence. A lesser standard of liability would mandate not equality but preference for women: it would create incentives for employers to bend over backwards in women's favor for fear of lawsuits. Now that most American women are working outside the home, in a broad range of occupations and with ever-

[14] The dissent also fails to explain why, if women are inevitably demeaned by conversations about heterosexual sex, men would not have felt equally demeaned or harassed by the graphic conversations about homosexual sex that took place at Scollon Productions.

> increasing responsibility, it seems perverse to claim that they need the protection of a preferential standard. The careful, heightened phrasing of a hostile environment claim, enforceable where working conditions have palpably deteriorated because of sexually hostile conduct, aims to enforce equality, not preference.

DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995). Similarly, feminist literature recognizes that eliminating sexual content in the workplace is not a viable or valuable goal of hostile work environment jurisprudence and that working women can be, and usually are, as comfortable as are men with sexually explicit conduct and conversations. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1794 (1998) ("Sexuality should not be conceptualized solely as a sphere of gender domination, but also as a potential arena of women's empowerment."); *id.* at 1791- 92 ("[F]eminism receives a bad rap when workers are fired in the name of a feminist-inspired cause of action for merely talking about sex . . . . [S]uch firings may sow the seeds of backlash against protecting women from genuinely harmful forms of hostile work environment harassment."); Barbara Gutek, *Sex and the Workplace: The Impact of Sexual Behavior and Harassment on Women, Men, and Organizations* 143 tbl.2 (1985) (showing that, even though 28% of a random sample of women working in male-dominated workplaces experienced frequent sexual talk or joking, a very minor percentage of those sampled considered sexual harassment to be a major problem at work); Ellen Carol DuBois & Linda Gordon, *Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought*, in *Pleasure and Danger: Exploring Female Sexuality* 31, 32-39 (Carol S. Vance ed., Pandora Press 1992) (discussing how 19th-century "social purity" feminists' emphasis on sexuality as a realm of

danger and oppression for women replicated sexist and classist tendencies within wider society to separate women into those deserving of protection and those deserving of condemnation); *cf.* Carlin Meyer, *Sex, Sin and Women's Liberation*, 72 Tex. L. Rev. 1097, 1119-20 (1994) (noting that, in the context of pornography regulation, "[j]udges, juries, and most members of the public are likely to find most explicit and `deviant' sexual depictions repell[e]nt and view as degrading not only sexual portrayals that descriptively, humorously, playfully, or ironically depict subordinated women, but also those that are explicitly intended to challenge that subordination").

Because we view all facts and inferences in favor of Ocheltree, we ave not relied on evidence regarding Ocheltree's participation in the offensive conduct, which, for the most part, she generally denied, to evaluate the sufficiency of the evidence to support the jury's verdict. Nevertheless, to place in context the dissent's description of the environment at Scollon Productions, we note there is substantial evidence that Ocheltree does not fit the dissent's model of femininity. Several witnesses testified that they heard Ocheltree talk about her "pet name" for her husband's penis and other sexual matters. (J.A. at 239-40, 278.) These witnesses also testified that Ocheltree brought a picture of herself to work in which she was dressed in a bikini and asked a co-worker if he thought it was sexy. One coworker testified that Ocheltree brought a picture into work of wall upon which her husband had written her name in urine. The coworker also testified about an occasion when two other workers were discussing whether to "use six or eight inch domes" to construct the head of one of the costumes, and Ocheltree "volunteer[ed] that she was not interested in six or eight inches because she had twelve inches waiting for her at home." (J.A. at 240, 343.) With respect to the body-piercing book, a coworker testified that Ocheltree

voluntarily looked at the book "by herself" while on break.[15] (J.A. at 343.) This evidence would suggest that Ocheltree was not any more sensitive to vulgarity than some of her male counterparts. Thus, in concluding that "a reasonable woman" would be more offended and demeaned by sexually explicit conversations than a man, the dissent adopts the very stereotypes that Title VII was designed to eradicate.

In sum, the dissent misapprehends the controlling law, ignores the context in which the offensive behavior took place, and attempts to transmute Title VII into a neo-Victorian chivalry code designed to protect what the dissent imagines to be the tender sensitivities of contemporary women. Such a requirement of preferential and paternalistic treatment would be a strange interpretation of statutory language that demands equality. For the above-stated reasons, we are constrained to reject the dissent's overly broad conception of when harassment constitutes "discriminat[ion] . . . because of . . . sex" in a hostile work environment claim.

D.

Finally, in response to the dissent's repeated assertions that we have not given proper deference to the jury's verdict, it bears mention that the jury should not have been given the opportunity to consider Ocheltree's claim because, as a matter of law, the evidence of sexual harassment was insufficient to submit the claim to the jury. The fact that the claim was improperly submitted to the jury does not allow us, as the dissent suggests, to affirm the jury's verdict on the basis of evidence that is legally

---

15 Ocheltree testified that she told her husband about the offensive conduct, and he told her "well, it is a male atmosphere, just suck it up." (J.A. at 114, 154.) She also testified that she used the "f—-" word, but not "in a sexual way." (J.A. at 130.)

insufficient to support the verdict. Our holding in this regard is neither novel nor exceptional; we consistently have granted judgment as a matter of law when presented in other Title VII cases with conduct of the type alleged by Ocheltree. *See, e.g., Lack*, 240 F.3d at 258, 262 (overturning a jury verdict on similar evidence presented here); *Hartsell*, 123 F.3d at 768-69, 772-73 (concluding that Hartsell was not entitled to proceed to trial when coworker referred to Hartsell as a "mini-van driving mommy," and made comments such as "[W]hy don't you go home and fetch your husband's slippers like a good little wife, that's exactly what my wife is going to do for me," and "We've made every female in this office cry like a baby. We will do the same to you."); *Dwyer v. Smith*, 867 F.2d 184, 187-88 (4th Cir. 1989) (affirming directed verdict in Title VII case despite evidence that female police officer was subjected to pornographic material placed in her station mailbox and to fellow officers' sexually explicit conversations); *Hopkins*, 77 F.3d at 751 (noting that "because of . . . sex in Title VII does not mean because of the victim's . . . vulnerability to sexually-focused speech or conduct" (internal quotation marks omitted)); *see also Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir.1995) ("The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women . . . . It is not designed to purge the workplace of vulgarity."). To the extent the dissent would have us employ a more lenient standard due to the extremely distasteful nature of the facts of this case, we agree that there exists "a profound difference in our respective approaches to reviewing a jury verdict." *Post* at 42.

III.

Regardless of how repulsive we find the behavior to have been during and before Ocheltree's employment with Scollon Productions, we are compelled to conclude that the

conduct does not give rise to an actionable claim for sexual harassment under Title VII. As we stated in *Hopkins*: "While we do not approve of [the plaintiff's co-worker's] apparent willingness to offend and provoke employees with his ambiguously sexual innuendoes, Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace . . . ." *Hopkins*, 77 F.3d at 754. "There perhaps `ought to be a law against' . . . puerile and repulsive workplace behavior . . . in order to protect the victims against its indignities and debilitations, but . . . Title VII is not that law." *Id.* at 752 (quoting *McWilliams*, 72 F.3d at 1196). "Ultimately . . . our role as courts is limited to faithfully interpreting the statutes enacted by the Congress and signed into law by the President," *Wrightson*, 99 F.3d at 144, and Title VII was not enacted as a workplace code for "gentlemanly conduct" or chivalry. Thus, we conclude that the district court erred by denying Scollon Productions's motion for judgment as a matter of law, and we reverse and remand for the district court to enter judgment in favor of Scollon Productions.[16]

REVERSED AND REMANDED WITH INSTRUCTIONS

MICHAEL, Circuit Judge, dissenting in part and concurring in the judgment in part:

Over the objections of Lisa Ocheltree's counsel, the district court directed a jury of four men and four women to answer a detailed set of special interrogatories about Ocheltree's sexual harassment claim against Scollon Productions, Inc. The jury answered every question in Ocheltree's favor and awarded her compensatory damages

---

16 Insofar as we conclude that Ocheltree failed to establish the essential elements of a sexual harassment claim, we likewise reverse the district court's denial of Scollon Productions's motion to set aside the jury's award of punitive damages.

of $7,280 and punitive damages of $400,000. (The district court later reduced the punitive damages to $42,720, bringing the total judgment against the company in line with the $50,000 cap imposed by 42 U.S.C. § 1981a(b)(3)(A).) Today, the majority reverses the entire judgment. It concludes that Ocheltree suffered (at most) only two incidents of harassment that were sex based: the vulgar song and the incident when Ocheltree's coworker performed simulated oral sex on a mannequin. It then concludes that, as a matter of law, these two incidents spaced over the eighteen-month period when Ocheltree worked at Scollon Productions were insufficient to create a hostile or abusive work environment. I agree that, under our precedents, the jury's verdict could not stand if the two incidents identified by the majority were the only evidence of sex-based harassment in the record. I believe, however, that the majority's conclusion rests on both an overly narrow conception of when harassment is "because of sex" and a failure to read the trial evidence in the light most favorable to Ocheltree. I would uphold the jury's decision that Ocheltree was subjected to a hostile work environment because of her sex. Because I would also hold that Scollon Productions had constructive knowledge of the harassment and failed to take effective remedial action, I respectfully dissent from the majority's decision to reverse the award of compensatory damages. I concur (with some reluctance) in the majority's judgment that the punitive damages award must be reversed.

I.

Title VII does not protect workers against all forms of verbal and physical harassment in the workplace. It protects only against conduct that is (1) unwelcome, (2) because of sex, and (3) "sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment." *Anderson v. G.D.C., Inc.*, 281

F.3d 452, 458 (4th Cir. 2002) (internal quotation marks and citation omitted). In addition, a plaintiff who establishes that her work environment was abusive can only recover if there is some basis on which responsibility for the abusive environment can be imputed to her employer.

In reviewing the district court's denial of Scollon Productions's motion for judgment as a matter of law, the first question is how much of the conduct complained of by Ocheltree could be seen by a reasonable jury as "because of sex." Once the truly sex-based conduct has been identified, the second question is whether that conduct could be seen by a reasonable jury as sufficiently severe or pervasive to create an abusive work environment. My problem with the majority's analysis is its answer to the first question. I believe that a reasonable jury could identify a much greater amount of the alleged harassment as sex based than the majority would allow. Once the first question is answered properly, a reasonable jury could regard the sex-based conduct complained of by Ocheltree as sufficiently severe or pervasive to create an abusive work environment.

Because I believe that a more detailed and explicit account of the trial evidence is needed to determine how much of the conduct complained of by Ocheltree could reasonably be seen as sex based, I begin my analysis by supplementing the majority's account of the evidence concerning Ocheltree's work environment. Much of what I add is raw, but without it the evidence is not presented in the light most favorable to Ocheltree.

Lisa Ocheltree began working in the production shop at Scollon Productions in February 1994. She was the only female employee in the shop, working alongside "ten or eleven" men. J.A. 110. In contrast, at least twenty women were employed in the "sewing room production area." J.A.

312.[1] Ocheltree testified that the atmosphere in the production shop was "fun" and "friendly" when she first began to work there, but that over the course of the first year of her employment, sexual banter and sexual conduct of other sorts began to occur with increasing frequency. J.A. 111, 113. Her testimony was seconded by Brian Hodge, who started working in the production shop several months after Ocheltree began working there. Hodge testified that the atmosphere seemed okay to him initially but that over time the work environment became increasingly coarse. J.A. 199-200.[2] Ocheltree recounted several specific incidents of harassment, the three most prominent of which (the vulgar song, the oral-sex-on-the mannequin incident, and the body-piercing book incident) are summarized by the majority.

The three incidents mentioned by the majority bear recounting here as part of the whole picture facing Ocheltree. On one occasion a male coworker went up to Ocheltree and sang the following song to her "like he was in the opera": "Come to me, oh, baby come to me, your breath smells like c[o]m[e] to me." J.A. 115. To Ocheltree's chagrin the men in the production shop expressed their enjoyment of the incident with much laughter. *Id.* On another occasion when Ocheltree arrived at work and proceeded to the time

---

1 The record does not indicate whether other women worked in the production shop either before or after the period when Ocheltree worked there.

2 The majority points to uncontested evidence that the atmosphere in the production shop was essentially the same before Ocheltree began working there as it was at the beginning of her employment. *Ante* at 8. This is irrelevant. The crucial point is this: Ocheltree's evidence established that the behavior she complained of worsened at some point after her arrival, and it became still more objectionable in the wake of her complaints. This evidence supports Ocheltree's claim that the harassing behavior was targeted at her as the only female in the production shop, thus belying the majority's assertion that the jury heard uncontested evidence that Ocheltree "would have been exposed to the same atmosphere had she been male." *Ante* at 7.

clock, two coworkers were positioned at a nearby mannequin. One was pinching the mannequin's nipples, and the other was on his knees simulating oral sex on the mannequin. Ocheltree said to the men, "You guys are disgusting. This needs to stop." As she turned to leave the room, she heard laughter in the background. J.A. 115-17. On the third occasion Ocheltree was seated at her work station, and some of her coworkers were looking at a book that contained pictures of men with pierced genitalia. One coworker took the book, approached Ocheltree, and opened the book to the centerfold photograph showing a man's crotch area. The scrotum was pierced with hoops, and there were chains running up to the top of the penis. The coworker, with his male colleagues looking on, said, "Lisa, what do you think about this?" Again, this generated laughter from the men in the shop. J.A. 117-18.

Ocheltree also presented evidence, not discussed by the majority, of other incidents that could reasonably be seen as sex-based harassment. Brian Hodge testified that some of the men who worked in the production shop would "often fondle" the mannequin as they walked by, J.A. 200, and that "anytime [Ocheltree] was walking by just about they would do something sexual to the mannequin in front of her just because they knew it bothered her," J.A. 202. In addition, Ocheltree testified that Ellery Locklear, vice president of Scollon Productions, berated her for using the phone to check in on her son, who was at home recovering after breaking his tail bone in two places. (Apparently, Ocheltree's call violated the company's telephone usage policy.) According to Ocheltree, Locklear told her, "I don't care if someone is dying in your family, you are not to be on the phone and you must be here at work." J.A. 129. Ocheltree claims that Locklear then said that if she did not like that rule, she ought to go home and be a housewife because she was not cut out for her work at Scollon Productions. *Id.* A jury could reasonably see this as another

piece of evidence suggesting that Ocheltree experienced harassment because of her sex. *Cf. Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 773 (4th Cir. 1997) (characterizing question to plaintiff about "whether she would be a `mini van driving mommy' or `be a salesperson and play with the big boys'" and statement that the plaintiff should "`go home and fetch [her] husband's slippers like a good little wife'" as "logically attributable" to the plaintiff's gender).[3]

Then there is the matter of the sexual banter that Ocheltree claims occurred on a daily basis. The majority describes this banter in only the most general terms, but the majority's reticence blunts the force of Ocheltree's case. I will therefore present, in the light most favorable to Ocheltree, an account of the running sexual commentary in the production shop.

Ocheltree presented evidence of several different kinds of inappropriate and unprofessional sexual remarks in her workplace that she views as evidence of sex-based harassment. One category is simply the extensive use of profanity, with many of the words sexually tinged: motherfucker, fuck, faggot, dickhead, pussy, ass, and the like. A second category involves Ocheltree's male coworkers' use of explicitly sexual insults to needle each other. For example, Ocheltree testified that "[g]uys would make hand gestures down at their private parts and tell other guys to suck it." J.A. 113. Coworkers sometimes suggested that various male employees were involved in

---

[3] The majority criticizes my reliance on this incident on the ground that the special interrogatories submitted to the jury were limited to questions about the conduct of Harold Hirsch, the shop supervisor, and Ocheltree's coworkers. *Ante* at 7-8 n.3. Yet Locklear was the vice-president of the company, and his actions are relevant to the ultimate question of whether Scollon Productions can be held liable to Ocheltree for the creation of a hostile work environment. *See Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (stating that harassing behavior by a corporate officer will be deemed that of the employer).

homosexual relationships and that one employee was having sex with a dog. A third category, and the one that strikes me as most significant, is Ocheltree's evidence that her coworkers constantly discussed their sexual exploits with their wives and girlfriends in extremely graphic terms. Ocheltree testified that her coworkers would regularly talk about their sexual experiences of the night before "as to that she swallowed, she gave good head, that I fucked her all night long," etc. J.A. 118. One employee related that his girlfriend "gave good head and that she likes to swallow, that she liked it from behind, that she would do it anywhere with him." J.A. 120. He further said that she "could suck a golf [ball] through a garden hose." J.A. 120. In his testimony, Brian Hodge recounted how one of the employees in the production area often "would speak of [his wife] sucking his dick and swallowing and letting it run down the side of her face and stuff." J.A. 200. Ocheltree testified that she heard remarks along these lines "every day." J.A. 120. Hodge also testified that he heard such remarks on a daily basis. J.A. 204. Finally, Ocheltree testified that on one occasion, shop supervisor Harold Hirsch said that he was interested in and enjoyed having sex with young boys and that Hirsch's comments were "purposefully said in front of [her] because [Hirsch and two other production shop employees] enjoyed looking at [her] and seeing [her] reaction." J.A. 119.

Having set out more fully the evidence concerning Ocheltree's workplace environment in the light most favorable to her, I turn to the question of whether and to what extent the objectionable conduct was sex based. Under the Supreme Court's *Oncale* decision the proper question is "'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). The majority acknowledges, at

least for the sake of argument, that a reasonable jury could regard the vulgar song and the incident involving simulated oral sex on the mannequin as sex based because they could be seen as "particularly demeaning towards women or as veiled sexual propositions." *Ante* at 11. It then reasonably concludes that two incidents over the space of eighteen months are insufficient as a matter of law to constitute an abusive work environment. I suspect that the majority would hold that even if a reasonable jury could regard the body-piercing book incident, the various mannequin fondling incidents described by Hodge, and Locklear's comment that Ocheltree should go home and be a housewife as sex based, the sum total of these incidents would still be insufficiently severe or pervasive as a matter of law. Though I have my doubts about that conclusion, I am willing to accept it for purposes of argument. To my mind, the majority's primary mistake is its conclusion that a reasonable jury could not regard *any* of the day-to-day sexual banter complained of by Ocheltree as sex based. The majority offers several reasons for this conclusion. First, it portrays Ocheltree as a mere bystander to discussions between the men in the production shop and claims that the same kind of talk would have occurred regardless of Ocheltree's presence there. In addition, it argues that even if some of the sexual banter was a reaction to Ocheltree's presence in the workplace or her complaints, the alleged harassment was still not sex based because "even if the alleged harassers were intending to bother Ocheltree, there is no evidence that those participating in the offensive conduct were attempting to bother her *because of her gender*." *Ante* at 10. The majority also observes that even though the banter was "sexually explicit" and "generally degrading, humiliating, and even insulting," it was not "aimed solely at females in any way." *Ante* at 9. I find these reasons unconvincing.

In my view, there are two ways in which a reasonable jury could find that much of the sexual banter complained of by Ocheltree satisfied the "because of sex" prong. First, a reasonable jury could find that much of the banter was "directed at" Ocheltree in the sense that it was intentionally said in her presence in order to make her uncomfortable and self-conscious about her status as the only woman in the production shop. Second, a reasonable jury could find that even if very few of the sexual remarks were made in response to Ocheltree's presence in the production shop, her male coworkers' relentless, graphic descriptions of their sex lives count as sex-based harassment because they portray women as sexually subordinate to men. Ocheltree's coworkers made her uncomplaining submission to an atmosphere suffused with degrading images of female sexuality an implicit condition of her employment, and this harassment was "because of sex" in the sense that it made the workplace more hostile to Ocheltree precisely because she was a woman.

A.

As to my first point, Ocheltree concedes that most of the offensive conduct was not aimed exclusively at her. Instead, she claims that her coworkers knowingly made sexual remarks and engaged in other behavior with a sexual content in her presence with the intention of making her uncomfortable. Ocheltree presented the following evidence in support of this theory. Ocheltree and Hodge both testified that Ocheltree's coworkers enjoyed offending her and laughing at her reactions. When asked whether the incident involving simulated oral sex on the mannequin was intended to provoke a reaction from her, Ocheltree testified: "Why else would two guys be doing that at the time when I was supposed to be in there going to work . . . and then whenever I say all this is disgusting and everyone laughs, who would it be directed to? I was the only female there."

J.A. 117. She also testified regarding Hirsch's remark about having sex with little boys that "[i]t was purposefully said in front of me because they enjoyed looking at me and seeing my reaction." J.A. 119. Brian Hodge testified that "[a]nytime [Ocheltree] was walking by just about they would do something sexual to the mannequin in front of her just because they knew it bothered her." J.A. 202. In addition, both Ocheltree and Hodge testified that sexual talk and conduct in the production area first became a problem after Ocheltree began working at Scollon Productions. Hodge further testified that the amount of sexual conduct and talk escalated considerably after Ocheltree complained about it at a safety meeting for production shop employees. J.A. 202-03. A reasonable jury could infer from this evidence that a considerable amount of the sexual talk and behavior in the production shop was intended, at least in part, to make Ocheltree uncomfortable and to provoke reactions from her.[4]

The majority also suggests that even if Ocheltree's coworkers intended to bother her, "there is no evidence that those participating in the offensive conduct were attempting to bother her *because of her gender*." *Ante* at 10. The majority does not elaborate, but I take its argument to be that

---

[4] The majority understates the evidence that the harassing behavior was intended to bother Ocheltree by mentioning only Hodge's testimony that Ocheltree's coworkers would "do something sexual to the mannequin" whenever Ocheltree walked by "just because they knew it bothered her." J.A. 202. The majority then dismisses this testimony because Hodge stated that he was only speculating about the motives behind the mannequin incidents. The majority places more weight on Hodge's characterization than it will bear. A reasonable jury could conclude that by characterizing his testimony as "speculation," Hodge simply acknowledged that he was making an inference when he said that Ocheltree's coworkers fondled the mannequin in order to bother her. Evidence in the form of inferences about the motives of other people is a common feature of Title VII cases, and there is nothing problematic about Hodge's testimony in this regard. *See, e.g., Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1179 (10th Cir. 2001).

Ocheltree's evidence could at most show that she was harassed not because she was a woman, but simply because she was offended by and objected to working in an environment saturated with sexually explicit remarks. *Cf. Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir. 1996) ("Title VII does not reach discrimination based on . . . [an employee's] sexual behavior, prudery, or vulnerability."). Perhaps the majority is correct to suggest that Ocheltree's argument fails if her coworkers harassed every employee — male or female — who was offended by or objected to the sexual talk and antics in the production shop. Such proof would suggest that Ocheltree was targeted not because of her sex, but simply because of her "prudery," her sensitivity to the sexual remarks.[5] The question, though, is how much proof Ocheltree has to produce before a reasonable jury could conclude that she was harassed because she was a prude *and a woman*, not simply because she was a prude. Here, Ocheltree was the only woman in a working environment with ten or eleven males who engaged in sexual talk and behavior in order to make her uncomfortable. Further, the majority observes that men sometimes complained about the sexual tenor of the workplace, but the jury heard no evidence that any conduct subsequent to these complaints was intended to bother the complaining men. Nor was there evidence that their objections or reactions were the subject of derisive laughter in the way that Ocheltree's were. In light of these points, I think a reasonable jury could see the harassment as rooted in male resentment of Ocheltree's intrusion into "their" workplace and in resentment of her demands that they clean up their act. *Cf.* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 Cornell L. Rev. 1169, 1211 (1998) (observing that when women enter a predominantly male

---

5 I note that the word "prudery" seems misplaced here. Prudery connotes an artificially refined sense of delicacy about sexual matters. A person would hardly need to be prudish to find the atmosphere in Ocheltree's workplace offensive.

workplace, male workers often seek to reaffirm the dominance of masculine norms in the workplace by "engag[ing] more intensely . . . in talk that sexualizes or derogates women"). In other words, a reasonable jury could conclude that Ocheltree was harassed not simply because she found the sexual behavior in the workplace offensive, but because she was a woman who found that behavior offensive. In sum, I believe a reasonable jury could conclude that much of the sexual banter in Ocheltree's workplace was directed at her because of her sex.

B.

What I have just said in part I.A is sufficient by itself to support the affirmance of Ocheltree's compensatory damages award. There is, however, another reason why a reasonable jury could conclude that a large part of the sexual banter in the workplace satisfied the "because of sex" prong. A reasonable jury could find that the content of much of the banter was "particularly demeaning towards women," *ante* at 11, and therefore made Ocheltree's working environment more hostile to her as a woman, regardless of whether the banter was intended to bother her or was directed at her in any other way. This means that even if I agreed with the majority that a reasonable jury would have to find that Ocheltree was a mere bystander to the sexual remarks in her workplace, I would still conclude that many of the remarks could reasonably be seen as satisfying the "because of sex" prong.

Title VII's because-of-sex requirement is most obviously satisfied in two common scenarios: when the plaintiff is the object of unwanted sexual advances, *see, e.g., Harris v. L & L Wings, Inc.*, 132 F.3d 978 (4th Cir. 1997), and when the plaintiff is the target of open hostility because of her (or his) sex, *see, e.g., Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000). We have never held, however, that

these two scenarios exhaust the field of sex-based harassment. Courts have also recognized that harassing conduct can be "because of sex" even when the conduct "is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex." *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991). *See also Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (stating that "we do not consider it an unfair burden of an employer of both genders to take measures to prevent an atmosphere of sexism . . . [from pervading] the workplace"). This category of sex-based harassment "describes behavior that creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment. That Title VII outlaws such conduct is beyond peradventure." *Robinson*, 760 F. Supp. at 1523. In *Robinson* the court held that a workplace plastered with pictures of nude and partially nude women (often in sexually submissive postures) was a hostile environment even though the posting of the pictures "did not originate with the intent of offending women in the workplace (because no women worked in the jobs when the behavior began)." *Id.* It was enough that the pictures had a "disproportionately demeaning impact on the women now working" in the same environment. *Id.*

Robinson and *Andrews* suggest that the majority is too quick to conclude that none of the sexual banter in the workplace constitutes sex-based harassment because Ocheltree "would have been exposed to the same atmosphere had she been male." *Ante* at 7. Even if true, the majority's point would still leave the question of "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris*, 510 U.S. at 25 (Ginsburg, J.,

concurring). In other words, there would still be a question of whether Ocheltree's environment was more hostile to her because of her sex than it would have been to a man.

Although our circuit has not yet decided a case using reasoning similar to that in *Robinson* and *Andrews*, such reasoning is a logical extension of well-established Title VII principles. Consider, for example, a traditionally all-male workplace in which women are routinely referred to as "bitches," "whores," and "cunts." Surely it is uncontroversial that a woman employee subjected to that environment would have a claim for sex-based harassment even if the employer could establish that the male workers would have spoken the same way regardless of her presence and even if the offensive words were never said directly to her. The reason is that such "unambiguous gender epithets," *ante* at 10, signal hostility to the presence of women in the workplace and create an atmosphere that is inhospitable to women because of their sex. Whether or not plastering pornographic and quasi-pornographic pictures on the wall can be said to display outright hostility toward women in the workplace, it can certainly be said to evince and to perpetuate attitudes that make the workplace hostile to women because of their sex:

> Pornography on an employer's wall or desk communicates a message about the way he views women, a view strikingly at odds with the way women wish to be viewed in the workplace. Depending upon the material in question, it may communicate that women should be the objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual. Any of these images may communicate to male coworkers that it is acceptable to view women in a

> predominantly sexual way. All of the views to some extent detract from the image most women in the workplace would like to project: that of the professional, credible coworker.

Robinson, 760 F. Supp. at 1526 (quoting Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1212 n.118 (1989)). *See also Andrews*, 895 F.2d at 1485-86 ("Obscene language and pornography quite possibly could be regarded as highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse" (internal quotation and citation omitted)). If use of unambiguous gender epithets can constitute sex-based harassment because it creates a workplace atmosphere suffused with hostility to women, there is no principled reason why a workplace suffused with depictions of women as sexual objects could not also constitute sex-based harassment. Thus, I conclude that a workplace environment could be abusive "because of" a plaintiff's sex even if the environment was essentially the same both before and after the plaintiff entered the workplace. Further, I can see no reason why the reasoning of *Robinson* and *Andrews* should be limited to sexually explicit *photographs* of women in the workplace. Sexual banter in the workplace that is the aural equivalent of pornography should surely be just as actionable as pornographic images. Here, the question is whether a reasonable jury could conclude that any of the sexual banter in Ocheltree's workplace was so disproportionately demeaning to women that it should count as harassment "because of sex." This question can only be answered by considering the content and context of the banter in question.

Although my reasoning is different, I agree with the majority that much of the sexual talk Ocheltree heard – vulgar though it may be– cannot be seen as disproportionately demeaning to women. Frequent use of such words as "fuck," "dickhead," and "ass" may be unprofessional and offensive, but I cannot say that a working environment permeated by such language is more offensive to women because of their sex than it is to men. Similarly, frequent exchanges of mock homosexual taunting (for example, male coworkers pointing to their genitals and telling other males to "suck it," J.A. 113) would be distasteful to most women (and, I believe, to most men), but they would not necessarily make the work environment more hostile to women because of their sex.[6] Ocheltree's coworkers' constant descriptions of their sexual exploits, including their near-obsessive interest in discussions of oral sex, are another matter altogether. Obviously, discussions of sexual matters (including discussions of oral sex) are not *automatically* demeaning to women. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1795 (1998) (citing research suggesting that "where men and women work alongside each other in balanced numbers . . . . sexual talk and joking occurs with frequency, but is not experienced as harassment"). But the tone of the discussions in the production shop was hardly one of mutuality and respect. *See supra* at 26 (recounting daily remarks by Ocheltree's coworkers along the lines of "she gave good head," "she likes to swallow," "she likes it from behind," etc.). Comments like these portray women as sexually subordinate to men; indeed, it is not too strong to say that the overall tenor of the workplace banter conveyed the message that women exist primarily to gratify male desires

---

[6] I would add, however, that such language could be sex-based harassment in the proper context – if, for example, it was used as part of a general campaign to create a sexually explicit atmosphere in the workplace in order to drive out women employees.

for oral sex. A reasonable woman would find this message offensive, to say the least. Further, the comments were far too graphic and frequent to be dismissed as "occasional vulgar banter, tinged with sexual innuendo." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) (internal quotation marks and citation omitted). Instead, they are instances of sexual harassment because they express and reinforce a regime of gender hierarchy in which men are portrayed as sexual subjects while women are portrayed as sexual objects. *See generally* Abrams, *The New Jurisprudence*, *supra* at 1205-25; Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 Stanford L. Rev. 691, 762-72 (1997). It is true, as Scollon Productions points out, that Ocheltree's coworkers did not proposition her or speculate about her sexual habits. But this is hardly dispositive. *See, e.g., Jackson v. Quanex Corp.*, 191 F.3d 647, 660 (6th Cir. 1999) (stating that "offensive comments need not be directed at a plaintiff in order to constitute conduct violating Title VII"). When a workplace is suffused with representations of women as sexual objects, a woman in that workplace would doubtless wonder whether the primary questions about her in the minds of her coworkers involved such matters as whether she "swallows" or whether she could "suck a golf ball through a garden hose." The demeaning portrayals of women as sexual objects in Ocheltree's workplace constituted sex-based harassment because they made the working environment more hostile to Ocheltree than to her coworkers precisely because she was a woman. That is enough to satisfy Title VII's "because of sex" prong, for the "critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring). I would hold, then, that a reasonable jury could conclude that the pervasive workplace comments depicting women as sexually subordinate to men constitute harassment "because of sex." These comments are

indistinguishable in principle from the harassment discussed in *Robinson* because they are "disproportionately. . . offensive or demeaning to one sex." *Robinson*, 760 F. Supp. at 1522-23.

C.

The majority mounts a strident attack on this last conclusion, and the attack boils down to three basic arguments. First, the majority argues that my position is incompatible with Supreme Court and circuit precedent regarding the "because of sex" requirement. Second, the majority asserts that my arguments depend on the untenable proposition that all sexual comments in the workplace are "disproportionately demeaning to women." Third, the majority argues that under our decision in *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255 (4th Cir. 2001), Ocheltree did not experience sex-based harassment because the production shop environment was also offensive to men. I will address each argument in turn.

First, according to the majority, it is well established that harassing conduct can only be "because of sex" if the plaintiff's gender is the "but for" cause of the harassment or the harassment is motivated by the plaintiff's gender. The majority therefore concludes that the comments and conduct on which I rely cannot constitute harassment "because of sex" because "Ocheltree would have been exposed to the same atmosphere had she been male." *Ante* at 7. I acknowledge that courts regularly explain the "because of sex" requirement by using the formulations favored by the majority, and in many contexts these formulations are helpful analytically. I believe, however, that the "because of sex" requirement allows for more interpretive flexibility than the majority recognizes. *Cf.* David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. Pa. L.

Rev. 1697, 1781 (2002) (suggesting that "`because of' does not necessarily mean `motivated by'"). Indeed, I believe this flexibility is inherent in *Oncale*'s formulation of the "because of sex" requirement as turning on the question of "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)). As the majority would no doubt observe, there is a sense in which both male and female workers were exposed to the same environment at Scollon Productions because the explicit discussions of oral sex and similar matters were heard by both Ocheltree and her male coworkers. Yet there is an equally obvious sense in which women in an atmosphere saturated with remarks demeaning to women are "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed" precisely because the language heard by both women and men is more demeaning to women than to men. It is this understanding that I rely upon in suggesting that the workplace comments portraying women as sexually subordinate to men qualify as harassment "because of sex."

By reasoning that harassment cannot be "because of sex" if the plaintiff "would have been exposed to the same atmosphere had she been male," the majority appears to commit this court to a course that is clearly wrong. Suppose, for example, that an African-American plaintiff brings a race discrimination claim alleging a hostile work environment due to his coworkers' daily use of the meanest racial slur against African-Americans. Suppose further that the workplace had previously been all white and that the pattern of racial slurs was the same both before and after the plaintiff's arrival. The majority's reasoning suggests that if the employer could show that none of the racial slurs were directed at the plaintiff and that he would have been

exposed to exactly the same language if he had been white, the harassment in this example could not be "because of race." Yet I find it difficult to believe that any court would fail to find race-based harassment on these facts. If the right to be free from a racially hostile work environment means anything at all, surely it includes the right to be free from a workplace environment permeated by racial slurs. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) ("Evidence of a general work atmosphere therefore – as well as evidence of specific hostility directed toward the plaintiff – is an important factor in evaluating [a hostile environment] claim." (quoting *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987))). I do not see how *Oncale* could compel a different conclusion. My explanation for this is simple: the plaintiff in my example suffers discrimination "because of race" because he is exposed to disadvantageous conditions of employment to which his white coworkers are not exposed. The workplace is therefore more hostile to him precisely because he is black. My example shows, I believe, that harassment can be "because of race" even if the plaintiff would have been exposed to the same atmosphere had he been white. If this is true, harassment can also be "because of sex" even if the plaintiff would have been exposed to the same atmosphere had she been male.

In further support of its first argument, the majority makes the interesting suggestion that my approach to the "because of sex" requirement wrongly attempts to apply disparate impact models of proof to sexual harassment claims. It is important to see why this is not so. As Professor Schwartz points out, disparate impact theory is designed to address "facially neutral employment practices that have a disparate impact (such as testing instruments or height-weight requirements) but that might be defensible under some degree of business necessity." *Schwartz, supra* at 1773. Workplace conversations depicting women as sexually subordinate to men, on the other hand, are not facially

neutral and they have no business justification. When women are characterized in this way, it is wrong to suggest that offense to women in the workplace is a "potential unintended effects" of the characterizations. *Ante* at 13. Instead, such characterizations constitute sexual harassment because they convey the message that women are, and should be, subordinate to men.

The majority's second argument is that under my proposed definition of sex-based harassment, any discussion of sex in the workplace constitutes sexual harassment because such discussions are necessarily more demeaning to women than to men. *See ante* at 16 (stating that my reasoning would mean that "conversations between males about their heterosexual activities in the presence of a female virtually always constitute sex-based harassment because, according to [my] characterization, these conversations depict women as `sexually subordinate to men'"); *ante* at 17 n.12 (stating that I propose "a rule whereby a reviewing court would affirm a finding of gender-based discrimination once a certain number of conversations about heterosexual behavior occur in the workplace in the presence of a female"). The majority observes that the rule it attributes to me would stand in some tension with the Supreme Court's observation in *Oncale* that it has "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." *Oncale*, 523 U.S. at 80. Further, the majority implies that I am ignorant of the "feminist literature" suggesting that "working women can be, and usually are, as comfortable as are men with sexually explicit conduct and conversations." *Ante* at 18. Indeed, my views are "paternalistic," *ante* at 18 and 20, rely on "outdated stereotypes," *ante* at 18, and attempt to transform Title VII into a "neo-Victorian chivalry code designed to protect

what [I] imagine[ ] to be the tender sensitivities of contemporary women," *ante* at 20. *See also ante* at 17 n.12 (stating that under my approach "Title VII would become a workplace code for `gentlemanly conduct' in the presence of women").

My first response to all of this upbraiding is that if I actually held the views attributed to me by the majority, the substance of its criticisms would be largely justified. It would, of course, be absurd for me to contend that all discussions of sex — regardless of their specific content — are automatically degrading and offensive to women. I am well aware of feminist criticisms of the idea that sex equals sexism in the workplace. *See, e.g., Franke, supra* at 714-25. To make the point once more, I do not claim that all discussions of sexual matters in the workplace are automatically demeaning to women or that work place sexual discussions are always more offensive to women than to men. Instead, I claim that Ocheltree's coworkers' constant, graphic descriptions of oral sex and other sexual practices could be seen by a reasonable jury as sex-based harassment because they portray women as sexually subordinate to men and thereby serve to perpetuate gender hierarchies in the workplace. It is the specific content of these descriptions ("she gave good head," "she swallows," etc.), and not simply their sexual nature, that qualifies them as harassment "because of sex." This is one of the reasons why I have found it necessary to set out Ocheltree's evidence about the atmosphere in the production shop in explicit detail.[7]

---

[7] In further response to the majority's charge that I have relied "upon the shock value of the salacious conduct" of Ocheltree's coworkers, *ante* at 12, I would add this: if we are going to overturn a jury verdict that so strongly favored Ocheltree, we ought at least to present the evidence in a way that gives some insight into why the jury might have reached the conclusions it did.

In short, the majority's second argument simply attacks a straw man.[8]

The majority's third argument is that under our decision in *Lack*, Ocheltree's sexual harassment claim must fail because some men complained about the work environment in the production shop. *See ante* at 9 (quoting *Lack*'s statement that the plaintiff's claim was "undercut[ ] . . . to a substantial extent" by the "fact that female employees . . . lodged similar complaints" against the male plaintiff's supervisor).[9] *Lack* should not be read as broadly as the majority suggests. The statement the majority takes from *Lack* was made in the context of examining whether the male plaintiff had offered direct comparative evidence about how his alleged harasser (a male supervisor) treated

---

[8] I also add two comments about the majority's efforts to tag me as paternalistic and neo-Victorian. First, if one of the majority's goals is to avoid paternalism in the Title VII field, that goal would be better served by focusing on whether the sexual talk was welcome or unwelcome than by adopting an unduly narrow reading of the "because of sex" requirement. *Cf.* Schwartz, *supra* at 1756-58. Second, if there is anything neoVictorian lurking in the opinions released today, it is the majority's suggestion that Ocheltree's claim should fail because "the offensive conduct [here] took place in a costume production shop where public access is controlled, not a church office, retail shop, bank, or professional office." *Ante* at 17. In other words, women in blue collar jobs must put up with conduct that women who work in banks or professional offices need not tolerate. *Cf. Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999) ("Surely women working in the trades do not deserve less protection from the law than women working in a courthouse.").

[9] The majority claims that Ocheltree "conceded that the [sexual] conduct [in the production shop] was equally offensive both to men and women." *Ante* at 9. I do not believe the record supports this characterization. So far as I can tell, Ocheltree simply acknowledged that some of her male coworkers also voiced some complaints about sexual conduct in the production shop. This does not amount to a concession that men were equally offended. *Cf. Brown v. Henderson*, 257 F.3d 246, 254 (2nd Cir. 2001) (stating that discrimination can be sex based if "a co-worker or supervisor treats both men and women badly, but women worse").

both men and women in the workplace. *See Lack*, 240 F.3d at 262; *cf. Oncale*, 523 U.S. at 80-81 (observing that harassing conduct that would not otherwise qualify as sex based can be shown to constitute discrimination "because of sex" through the use of "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace"). My argument here does not rely on comparative evidence. Instead, I am claiming that workplace comments portraying women as sexually subordinate to men satisfy the "because of sex" requirement because they express and reinforce gender hierarchy in the workplace. Such comments are, in this respect, analogous to *Oncale*'s "sex-specific and derogatory terms" that signal "hostility to the presence of women in the workplace." *Oncale*, 523 U.S. at 80. If this theory is correct – and I recognize, of course, that the majority rejects it – I do not see how Ocheltree's claims can be defeated simply by observing that some men at Scollon Productions also complained about the sexual conduct in the production area.[10] The Second Circuit has explained that harassment of a woman can be sex based if she is "abused in ways that cannot be explained without reference to her sex, notwithstanding the fact that a man received treatment at least as harsh, though for other – non-sexual – reasons." *See Brown*, 257 F.3d at 254. Along the same lines, our analysis in *Lack* seems to indicate that the sexual conduct complained of by some of Ocheltree's male coworkers here would not constitute harassment of them "because of sex." *See Lack*, 240 F.3d at 261 n.8 (noting that "when expressions such as `fuck me' . . . are used by men speaking to other men, often their use has no connection whatsoever with the sexual acts to which they make reference'" (quoting *Johnson*

---

[10] The majority is not specific about the subject of the men's complaints, but I assume the majority's point is that some men in the production shop were offended by taunting from male coworkers that included explicit or implicit references to homosexuality (men pointing to their genitals and telling other men to "suck it," etc.).

v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997))). It follows that if I am right in my basic contention that the workplace comments depicting women as sexually subordinate to men could be regarded by a reasonable jury as discrimination "because of sex," the fact that some male coworkers were also offended by the comments does not undermine Ocheltree's case.

D.

Because I would hold that much of the sexual discussion in Ocheltree's workplace constituted sex-based harassment, my approach to the "severe or pervasive" prong of the hostile environment analysis is quite different than the majority's. For me, the proper question is whether a reasonable jury could find that, taken together, the vulgar song, the various mannequin incidents, and the workplace banter involving degrading descriptions of female sexuality were sufficiently severe or pervasive to alter the conditions of Ocheltree's employment and to create an abusive work environment. There is no question that Ocheltree subjectively perceived the production shop environment as hostile. In deciding whether a jury could also reasonably conclude that the environment was objectively hostile (hostile to "a reasonable person in the plaintiff's position," *Oncale*, 523 U.S. at 82), we are required to consider "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. The Supreme Court has emphasized that an abusive work environment need not "lead[ ] to a nervous breakdown." *Id.* at 22. It is enough if the environment "detract[s] from employees' job performance, discourage[s] employees from remaining on the job, or keep[s] them from advancing in their careers." *Id.* Applying these

standards here, I readily conclude that a reasonable jury that fully credited Ocheltree's evidence could find that a reasonable person in her circumstances would experience the work environment as abusive. Ocheltree and Hodge both testified that the explicit and degrading discussions of oral sex and related matters took place on a daily basis. While the relentless sexual remarks were not physically threatening, they were humiliating to women generally and highly offensive to Ocheltree. They surely made it more difficult for her to do her job.

E.-

My primary objection to the majority opinion is that it has turned the "because of sex" requirement into an obstacle where it had not been an obstacle before, thereby making it more difficult to establish a sexual harassment claim. I have an additional point, however. There appears to be a profound difference in our respective approaches to reviewing a jury verdict. Again and again, the majority characterizes the evidence in a light more favorable to Scollon Productions than to Ocheltree. This reaches its apex when the majority suggests that there is "substantial evidence" that Ocheltree's own offensive conduct contributed to the coarse atmosphere in the production shop. *See ante* at 19-20. Ocheltree specifically denied the vulgar activity attributed to her by the majority, J.A. 147-48, and the jury believed her. Indeed, it appears that the jury believed virtually everything that Ocheltree and her witnesses said and dismissed the testimony of Scollon Productions' witnesses as unworthy of belief. That was the jury's prerogative, and we are bound to respect it.

* * *

For all of these reasons, I respectfully dissent from the majority's holding that the evidence presented at trial was insufficient to support the jury's decision that Ocheltree was subjected to a hostile environment because of her sex.

II.

This conclusion makes it necessary for me to indicate, albeit briefly, how I would resolve the questions in this case that the majority has no need to reach. On the question of whether liability for the hostile work environment could be properly imputed to Scollon Productions, I conclude that a reasonable jury could find that the company had constructive knowledge of the harassment because it failed to establish adequate procedures for receiving sexual harassment complaints. Accordingly, I would affirm the jury's modest award of compensatory damages to Ocheltree. I concur in the majority's judgment reversing the award of punitive damages because Ocheltree failed to produce evidence that would allow a reasonable jury to conclude that any Scollon Productions employee "discriminated in the face of a known risk that his conduct [would] violate federal law." *Anderson*, 281 F.3d at 460.

AO 450 (Rev. 5/85) Judgment in a Civil Case

SCANNED
FILED
APR 17 2001

LARRY W. PROPES, CLERK
COLUMBIA, S.C.

ENTERED
APR 17 2001

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

LISA L. OCHELTREE
Plaintiff

AMENDED JUDGMENT IN A CIVIL CASE

vs.

Case Number: 3:96-1215-10

SCOLLON PRODUCTIONS, INC.
Defendant

[ ] Jury Verdict. This action came before the Court for a trial by jury.

[X] Decision by Court. This action came to hearing before the Court. The court having duly heard and granted the defendant's motion to amend the judgment entered 9-22-99, and the court having duly heard and granted the plaintiff's motion for an award of attorney's fees;

IT IS ORDERED AND ADJUDGED that the plaintiff, Lisa L. Ochletree, recover of the defendant, Scollon Productions, Inc., the sum of Seven Thousand, Two Hundred Eighty Dollars ($7,280.00) actual damages, and the sum of Forty-Two Thousand, Seven hundred Twenty Dollars ($42,720.00) punitive damages with post judgment interest at 4.07%.

IT IS FURTHER ORDERED that the plaintiff shall recover of the defendant her costs of action and her attorney's fees in the amount of Thirty-Two Thousand, Six Hundred Eighty-Eight and Twenty/100ths Dollars ($32,688.20).

LARRY W. PROPES, Clerk

By:_____
Nancy M. Harris, Deputy Clerk

April 17, 2001

SCANNED
FILED
APR 13 2001

LARRY W. PROPES, CLERK
COLUMBIA, S.C.

ENTERED
APR 16 2001

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Lisa L. Ocheltree, Plaintiff, vs. Scollon Productions, Inc. Defendant.	)	Civil Action No.: 3:96-1215-10 ORDER

This matter is before the Court upon Defendant's Motion To Amend Judgment And For Judgment As A Matter Of Law Or, As An Alternative To Judgment As A Matter Of Law, For New Trial, and upon Plaintiff's Motion For Award Of Attorney's Fees.

The Plaintiff initially filed this case asserting causes of action for sexual harassment, retaliation, and wrongful discharge. This court thereafter entered summary judgment against the Plaintiff upon the basis that the employer was

not aware of nor was it put on notice of the alleged sexual harassment. The Plaintiff appealed my ruling to the Fourth Circuit Court of Appeals. During the pendency of the appeal, the United States Supreme Court issued opinions in two sexual harassment cases, Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 Sup. Ct. 2257, 141 L. Ed. 2d 633 (1998) and Faragher v. Boca Raton, 524 U.S. 775, 118 Sup. Ct. 2275, 141 L. Ed. 2d 662 (1998). In these cases, the Supreme Court held that an employer may be subject to vicarious liability to a victimized employee for an actionable hostile environment "created by a supervisor with immediate (or successfully higher) authority over the employee," subject to an affirmative defense. The Supreme Court thus "rejected the rule...that an employer is liable only if it has notice of a supervisor's offensive behavior." Lissau v. Southern Food Service, Inc., 159 F. 3d 177, 181 (4th Cir. 1998).

In the present case, the Fourth Circuit Court of Appeals affirmed this Court's dismissal of the Plaintiff's wrongful discharge and retaliation claims, but vacated summary judgment on the sexual harassment claim and remanded "that issue for further proceedings in light of Ellerth and Faragher." See, Ocheltree v. Scollon Productions, 4th Circuit, No. 97-2506, August 11, 1998 (unpublished).

Upon remand, this case was tried before a jury on September 14, 20 and 21, 1999. The jury returned a verdict against the Defendant, Scollon Productions, Inc., and awarded the Plaintiff compensatory damages in the amount of $7,280.00, plus punitive damages in the amount of $400,000.00.

Initially, Defendant moves for judgment as a matter of law upon the grounds there is no evidence justifying an award of punitive damages. In Kolstad v. American Dental Association, 527 U.S. ____, 119 S. Ct. ____, 144 L. Ed. 2d 494 (1999), the Supreme Court affirmed two standards of liability for awarding compensatory and punitive damages in a Title XII employment discrimination case against a corporate employer. The Supreme Court, citing the statutory language of 42 U.S.C. §1981(a), held that a corporate employer could be liable for punitive damages where the Defendant has engaged in discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual.

The Fourth Circuit Court of Appeals has stated that in evaluating the sufficiency of evidence as to the malice or reckless indifference of employers, courts have typically focused on three types of evidence: (1) evidence of the

employer's attitude toward sexual harassment; (2) direct statements by the employer about Plaintiff's right or complaints; and (3) the egregiousness of the conduct at issue. Harris v. L & L Wings, Inc., 132 F. 3d 978, 983 (4th Cir. 1997).

The evidence presented at trial indicated the Defendant, Scollon Productions, Inc., had no formal or written policy concerning the issue of sexual harassment in the work place. Further, the evidence at trial indicated that Scollon Productions did not conduct any type of training, seminars, distribution of literature, or any other means of addressing sexual harassment with the employees nor did it otherwise have any policy discouraging sexual harassment or clearly stating that such conduct would not be tolerated in the employment work place. No evidence was presented by the Defendant indicating any proactive efforts on its part to prohibit sexual harassment in the work place and the jury could have therefore inferred the employer's attitude towards sexual harassment was one of indifference or little concern.

In addressing the second element to be reviewed by the Court in evaluating the evidence on malicious or reckless indifference of employers, testimony at trial

indicated the Plaintiff attempted on at least two occasions to complain to either Bill Scollen or Ellery Locklear, president and vice-president of Scollon Productions, Inc., respectively. Plaintiff testified that she had gone into the office of Mr. Scollon to complain about the work place conduct and that he directed her to Mr. Locklear because he did not have time to discuss the matter. Upon going to Mr. Locklear's office, Mr. Locklear was on a telephone call and Plaintiff testifies she wrote on a piece of paper that she needed to speak with Mr. Locklear as soon as possible about an important subject and placed it in front of him. Plaintiff was then instructed to return to work by her supervisor, Harold Hirsch, and Mr. Locklear testified that he never sought out Plaintiff or attempted to find her to discuss her concern or complaint. Furthermore, even Mr. Scollon admitted the Plaintiff had approached him one day in the work place and indicated she wanted to speak with him, but he had refused to talk to Plaintiff because of what he perceived as a recent policy violation concerning her use of the telephone. In fact, Scollon testified that he deemed whatever Plaintiff had to say to him at that time as "unimportant". Mr. Scollon also testified that he never further sought out Plaintiff again to inquire as to what she wanted to discuss or address her concern or any possible complaint.

Finally, Plaintiff offered testimony concerning the egregiousness of the conduct at issue. Plaintiff and other witnesses testified that vulgar profanity, sexual jokes, sexual remarks, and sexual innuendo were directed at the Plaintiff on a daily basis. The Plaintiff and two of her co-workers, Brian Hodge and Bill Killman, testified about not only the sexual jokes and sexual remarks made to Plaintiff, but also other lewd acts including male co-employees feigning sexual intercourse and oral sexual acts on a mannequin, showing Plaintiff pictures in a book of men's pierced genitalia, singing a lewd song to Plaintiff while standing directly in her face while co-employees and her supervisor laughed, and talked about performing sexual acts on women and young boys. Plaintiff and these two witnesses also testified that Plaintiff complained in a monthly safety meeting about the conduct and hostile work environment. Plaintiff's supervisor, Harold Hirsch, was in this meeting. Plaintiff and Brian Hodge testified that the conduct and sexual remarks only worsened after her complaint in the safety meeting. The Plaintiff and several other witnesses testified that Plaintiff's supervisor, Harold Hirsch, not only condoned this misconduct, but, in fact, was a participant himself in the activity and never made any efforts to discourage or prohibit such conduct.

Additionally, and perhaps more important, the jury was given a very detailed special interrogatory which accompanied the verdict form. The questions on the special interrogatory conformed with the jury charges presented by the Defendant. In addition to the instructions which were given to the jury concerning its deliberation on the elements of punitive damages, the special interrogatory required the jury to make a specific finding concerning the elements necessary to establish this claim, including a finding that the employer acted with malice or reckless indifference to the Plaintiff's federally protected rights. The jury found the Plaintiff proved this necessary element. Based upon the evidence presented at trial and the jury's specific findings, the Court finds the Defendant's motion for judgment as a matter of law on the grounds no evidence was presented justifying an award of punitive damages should be denied.

Defendant next moves for judgment as a matter of law on the grounds that Plaintiff did not establish the necessary elements for hostile work environment die to sexual harassment. To establish a claim of sexual harassment for an abusive work environment, either by co-workers or by a supervisor, Plaintiff must prove that: (1) the subject conduct was unwelcome; (2) it was based upon her sex; (3) it was sufficiently severe and pervasive to alter the

conditions of Plaintiff's employment and to create a hostile environment; and (4) it was imputable on some factual basis to the employer. Harris v. Forklift Systems, Inc., 501 U.S. 17 (1993): Spicer v. Comm. Of Va. Dept. of Corrections, 66F. 3d 705 (4th Cir. 1995) (en banc).

The Plaintiff testified, and the jury found, that the conduct complained of was unwelcome. At trial, the Defendant attempted to suggest to the jury that the conduct was not unwelcome because Plaintiff herself used vulgar language or profanity or made sexual remarks concerning her husband's genitalia. However, the jury specifically found on the special interrogatory that the conduct complained of was unwelcome and the Court finds there was sufficient evidence that a reasonable jury could reach this inference.

The jury also specifically found, as evidenced by its answer on the special interrogatory, the conduct complained of was specifically directed at Plaintiff because of her gender. As discussed herein, two witnesses testified the Plaintiff complained of inappropriate language and conduct in a monthly safety meeting and the conduct became more pervasive and severe after the Plaintiff's complaint. The Court therefore finds there was sufficient evidence

presented by Plaintiff such that a reasonable jury could reach this inference.

Defendant next contends the conduct complained of by Plaintiff was not sufficiently severe or pervasive to constitute harassment. As the Supreme Court set forth in Harris, factors relevant to the Court's inquiry concerning severity or pervasiveness include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with Plaintiff's work performance." Harris, 510 U.S. at 22. The Plaintiff, as well as other witnesses, testified about the inappropriate comments heard in the work place and the frequency of their occurrence. Plaintiff and other witnesses testified that terms such as "mother fucker", "faggot", "dick head", "pussy", "blow job" and "ass" were heard literally every day. Testimony was also presented concerning co-employees telling Plaintiff that their wives or girlfriends "liked to swallow" and that Plaintiff's supervisor indicated that he liked to have anal intercourse with young boys. The Court thus finds that sufficient evidence was presented that a reasonable jury could infer that the conduct complained of by the Plaintiff was sufficiently severe and pervasive to alter the conditions of her employment. In fact, one co-employee,

John Riddle, who was called as an adverse witness by the Plaintiff, admitted that the sexual comments and jokes which occurred at the work place affected his employment as well.

The Defendant also contends it is entitled to judgment as a matter of law because there was no evidence that Scollon management knew or should have know of the hostile work environment and failed to take reasonable steps to correct it. While the Plaintiff did, in fact, testify she never actually voiced her complaint of the hostile work environment to Bill Scollon or Ellery Locklear, the evidence showed the Plaintiff attempted to bring this matter to the attention of management and attempted to complain to them but to no avail. Additionally, it was undisputed that Plaintiff complained to her immediate supervisor, Harold Hirsch, about the improper conduct, including in the monthly safety meeting.

Plaintiff contended that management either directly knew, or should have known, of the hostile work environment. Harold Hirsch was the "shop supervisor" and was shown in an exhibit introduced at trial by Plaintiff as reporting directly to Vice-President Locklear. Mr. Hirsch was responsible for the shop technicians in the production

area, including Plaintiff and the shop technicians whom Plaintiff contends created the hostile work environment. Plaintiff presented testimony at trial that Hirsch also participated in the conduct which created the hostile work environment. Plaintiff's co-worker, John Riddle, testified that he did, in fact, complain about the sexual comments and jokes in the production area and testified that he also brought it to the attention of "Harold Hirsch or Ellery Locklear." There was therefore some evidence indicating that the hostile work environment was brought to the attention of management or that management, of which Harold Hirsch was a member, participated in the hostile work environment.

In Garber v. Saxon Business Products, Inc., 552 F. 2d 1032 (4th Cir. 1977), the Fourth Circuit recognized that "an employer policy or acquiescence in a practice" of sexual harassment can constitute a violation of Title VII. As the Court further stated in Katz v. Dole, 709 F. 2d 251 (4th Cir. 1983): "[W]hen such harassment pervades the work place, or is condoned or carried out by supervisory personnel, it becomes an illegal and discriminatory condition of employment that poisons the work environment." 709 F. 2d p. 254 ; see also 42 U.S.C. §2000(e)-2(a)(1).

Plaintiff presented evidence that the harassment at Scollon Productions was both condoned and carried out by supervisory personnel. Additionally, the special interrogatory specifically asked the jury if it found by a preponderance of the evidence that the management of Scollon Productions, Inc., either knew or should have known of those actions and failed to take reasonable steps to stop them, to which the jury responded in the affirmative. The Court finds that Plaintiff presented sufficient evidence such that a reasonable jury could infer that Scollon knew or should have known of the harassment and failed to stop it.

Finally, Defendant contends that it is entitled to judgment as a matter of law because no evidence was presented that Harold Hirsch's employment relation to Plaintiff constituted a continuing threat to the conditions of her employment that made her vulnerable to and defenseless against his actions. Plaintiff presented testimony that Harold Hirsch approved, at least initially, all requests for vacation and leave time. Evidence was also presented that Harold Hirsch controlled certain aspects of Plaintiff's employment, including assignment of work, approval of work, approval of the quality of work, as well as control of break times. Evidence was presented by Plaintiff of Hirsch's testimony at a hearing before the South Carolina

Employment Security Commission wherein Hirsch referred to "my" department and certain actions which were detrimental to "my" authority. Again, the jury specifically responded affirmatively to the questions on the special interrogatory which asked whether Mr. Hirsch had the power to hire, fire, demote, promote, transfer or discipline Ms. Ocheltree or otherwise affect the conditions of her employment and that Mr. Hirsch's employment relation to Ms. Ocheltree as her supervisor constituted a continuing threat to her employment condition that made her vulnerable to and defenseless against these actions in way that comparable conduct by a mere co-worker would not. The Court therefore finds there was sufficient evidence such that a reasonable jury could reach this inference and denies this basis for Defendant's motion.

For the foregoing reasons, Defendant's motions for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure is hereby denied.

Defendant also moves for a new trial under Rule 59 of the Federal Rules of Civil Procedure. Essentially, Defendant reasserts each of the reasons and bases for a new trial upon which it sought judgment as a matter of law. Accordingly, for the same reasons set forth hereinabove,

Defendant's motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure is denied.

Defendant also moves to amend the judgment. 29 U.S.C. §1981 (a)(b)(3) provides a maximum recovery to Plaintiff for compensatory and punitive damages in Title VII cases of $50,000.00 when the Defendant employs fewer than 101 employees. Since the evidence presented at trial showed the Defendant employed 51 people, based upon the clear language of the statute, the Defendant's motion to amend the judgment is hereby granted pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and the judgment is amended so as to reduce the punitive damages from $400,000.00 to $42,720.00, providing for a total judgment in the amount of $50,000.00 in favor or the Plaintiff against the Defendant, Scollon Productions, Inc.

Plaintiff has filed a motion requesting an award of attorney's fees and costs. Plaintiff has submitted an itemized statement by her attorneys reflecting time and services spent in this case. These time sheets reflect that William E. Hopkins, Jr. of McCutchen, Blanton, Rhodes & Johnson, L.L.P. expended 136.25 hours toward this matter and the firm expended $2,206.95 in costs and expenses. Wesley Locklair, Esquire of Chapman and Locklair, P.A.

also submitted a time sheet showing 53.1 hours expended on behalf of Plaintiff. Plaintiff's counsel are seeking fees based upon the time spent on this case at an hourly rate of $175.00 per hour for William E. Hopkins, Jr. and $125.00 per hour for Wesley Locklair. Mr. Hopkins is a partner with the law firm of McCutchen, Blanton, Rhodes & Johnson, L.L.P. and Mr. Locklair is an associate with Chapman & Locklear, P.A. Affidavits have been submitted by Mr. Hopkins, as well as Malissa Burnette, Esquire and Herbert Louthian, Esquire. Based upon these affidavits, as well as the factors set forth and enunciated by the Fourth Circuit in Barbar v. Kimbrall's, Inc., 577 F. 2d 216, 226 (4th Cir. 1978), and again set forth in Allen v. Burke, 690 F. 2d 376 (4th Cir. 1982), the Court finds the fees requested to be reasonable. Therefore, the Court hereby awards Plaintiff's counsel fees as follow: 136.25 hours expended William E. Hopkins, Jr. at the rate of $175.00 for a total of $23,843.75 plus $2,206.95 in costs and expenses expended by the firm of McCutchen, Blanton, Rhodes & Johnson, L.L.P., plus 53.1 hours for Wesley Locklair at an hourly rate of $125.00 for a total of $6,637.50, for a total award of $32,688.20.

Now therefore, IT IS HEREBY ORDERED:

1. The Defendant's Motion for Judgment As A Matter Of Law Or, As An Alternative To

Judgment As A Matter Of Law, For New Trial is denied.

2. The Defendant's Motion to Amend Judgment is granted, thereby reducing the judgment to $7,280.00 actual damages and $42,720.00 punitive damages.

3. The Plaintiff's Motion for an Award of Attorney's Fees is granted in the amount of $23,843.75 to William E. Hopkins, Jr., plus reimbursement of expenses of $2,206.95, and $6,637.50 to Wesley Locklair. The Clerk of Court is instructed to further amend the judgment against the Defendant in the amount of $32,688.20.

AND IT IS SO ORDERED.

The Honorable Matthew J. Perry, Jr.
Senior Judge, United States District Court
Columbia, South Carolina

April 13, 2001

No. 03-617

OFFICE OF THE CLERK

In The
Supreme Court of the United States

SCOLLON PRODUCTIONS, INC.,
Petitioner,

v.

LISA OCHELTREE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

John Wesley Locklair III
Counsel of Record
JOYE & LOCKLAIR
3575 Highway 17 Business
Murrells Inlet, SC 29576
(843) 357-6454

Counsel for Respondent

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, Virginia 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals was correct in upholding a jury's decision that Respondent was harassed "because of her sex."

2. Whether the Fourth Circuit Court of Appeals was correct in analyzing the "severe or pervasive" standard under the totality of the circumstances.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI 8

I. NO SPLIT EXISTS AMONG THE CIRCUIT COURTS REGARDING ANY LEGAL ISSUE IN THIS CASE 8

II. THIS COURT HAS ALREADY DEFINED THE SEVERE OR PERVASIVE STANDARD 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

Andrews v. City of Philadelphia,
895 F.2d 1469 (3d Cir. 1990) 13

Crist v. Focus Homes, Inc.,
122 F.3d 1107 (8th Cir. 1997) 14

Cruz v. Coach Stores, Inc.,
202 F.3d 560 (2d Cir. 2000) 13

DeAngelis v. El Paso Mun. Police Officers Ass'n,
51 F.3d 591 (5th Cir. 1995) 11

Galloway v. Gen. Motors Serv. Parts Operations,
78 F. 3d 1164 (7th Cir. 1996) 10-11

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993) 9, 11, 12

Jackson v. Quanex Corp.,
191 F.3d 647 (6th Cir 1999) 13

Ocheltree v. Scollon Productions, Inc.,
335 F. 3d 325 (4th Cir. 2003) 9, 10

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 9, 10, 11, 12

O'Rourke v. City of Providence,
235 F.3d 713 (1st Cir. 2001) 13

Reeves v. Sanderson Plumbing Products,
530 U.S. 133 (2000) 8

Smith v. Sheahan,
189 F.3d 529 (7th Cir. 1999) 12, 13

Spicer v. Com. Of Va. Dept. of Corrections,
66 F.3d 705 (4th Cir. 1995) (*en banc*) 9

Turnball v Topeka State Hosp.,
255 F. 3d 1238 (10th Cir. 2001) 14

Whidbee v. Garzarelli Food Specialties, Inc.,
223 F. 3d 62 (2nd Cir. 2000) 13

Wyerick v. Bayou Steel Corp.,
887 F.2d 1271(5th Cir. 1989) 13

BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent, Lisa Ocheltree, presents this Brief in Opposition to the Petition for Writ of Certiorari by Scollon Productions, Inc.. Ocheltree respectfully requests that this Court deny Scollon's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Fourth Circuit Court of Appeals, sitting *en banc*, affirmed a jury's finding that Lisa Ocheltree was sexually harassed while employed at Scollon Productions. The *en banc* panel reviewed the jury's findings in this case and correctly found that the evidence in this particular case supported the jury's verdict. Petitioner now wishes to take exception with the factual findings of the jury. However, this case merely presents the correct application of current law to a very fact-specific case by a jury and the Fourth Circuit Court of Appeals *en banc* panel.

Lisa Ocheltree worked for Scollon Productions for eighteen months. After being terminated from her employment for reasons irrelevant to this case, Ocheltree brought an action under Title VII for the sexual harassment she had to endure while employed at Scollon. At trial, the jury answered a detailed five page special interrogatory submitted by Petitioner over Ocheltree's objections. To impose liability, the special interrogatories required the jury to find that Ocheltree was discriminated against because of her sex and that

the discrimination was severe or pervasive to a reasonable person. The jury found for Ocheltree and awarded her $7,280 in compensatory damages and $400,000 in punitive damages.

The evidence showed that while employed as the only female in the production shop area, Ocheltree was subjected to numerous instances of harassment. The "incident" Petitioner mentions with the mannequin (the record does not reflect it was "featureless" as Petitioner claims) occurred as Ocheltree was arriving at work and had to pass the mannequin to get from the time clock to her work station. Once Ocheltree arrived and found the two men simulating sexual acts on the mannequin, the men went back to their workstations while almost everyone in the shop laughed at Ocheltree. As far as the allegation of Ocheltree looking at the body piercing book, she was never questioned specifically about this; but at trial she denied participating in any sexual misconduct, using any sexual language, or acting otherwise inappropriately.

Petitioner alleges the song and mannequin incident were the only conduct arguably directed towards her. Petitioner's statement is inaccurate and not supported by the record. First, there was not just one mannequin incident. There were many instances of sexual acts being performed on the mannequin. Testimony at trial indicated that almost every time Ocheltree would walk by, the men would do something sexual to the mannequin. Additionally, a picture of a male's genitals in the piercing book was shown to Ocheltree. She was also subjected to Hirsch's

disgusting conversation concerning young boys. The men in the shop laughed at Ocheltree's reaction on both of these occasions as well. Furthermore, Petitioner fails to account for the incident involving the man who told Ocheltree an off-color joke and was terminated by Scollon for a variety of reasons.

Additionally, the general workplace was full of general sexual talk and misconduct. Ocheltree was subjected to a daily barrage of language that included "motherfucker," "dickhead," "faggot," "pussy," and "blow job." Ocheltree was forced to hear stories about men's sexual exploits of their wives and girlfriends, including comments such as, "she swallowed, she gave good head, [or] I fucked her all night long." There was talk of two men being involved in a homosexual relationship and comments about one man having sex with a dog.

One man told the shop that his girlfriend "gave good head, that she likes to swallow, that she liked it from behind, [and] that she would do it anywhere with him." This same man further commented that his girlfriend could "suck a golf ball through a garden hose." A separate employee "would speak of [his wife] sucking his dick and swallowing and letting it run down the side of her face and stuff." Ocheltree's supervisor, Harold Hirsch, would talk of his desire to have sex with young boys and how he "enjoyed . . . licking young boys' dicks." Incredibly, Petitioner contends most of the offensive statements "could be broadcast on primetime television."

Petitioner further alleges "the testimony did not at all indicate that they laughed at her reaction." As the *en banc* court stated, there was "shoproom laughter that erupted at Ocheltree's expense," and Hirsch would frequently join in the laughter. There was testimony Ocheltree's co-workers laughed when the song was sung to her regarding her breath smelling like "cum," laughed concerning incidents with the mannequin, laughed at her embarrassment over the picture in the body-piercing book, and laughed when Hirsch was telling others about his sexual desires for young boys. This last comment was purposefully said in front of Ocheltree at her workstation. Petitioner's claim that Ocheltree's testimony did not indicate the men laughed at her reaction is not in accord with the record. In addition to the numerous events mentioned above, Ocheltree *specifically* testified at trial that the men "enjoyed looking at [her] and seeing [her] reaction."

Petitioner accuses Ocheltree of participating in some of the crude conduct. The facts show she never talked about anything of a sexual nature, she never joined in any of the sexual conversations which occurred in the shop, she never talked in the shop about her husband's penis, and she never brought any sexual-type photos to work and showed them to co-workers.

Petitioner raised the issue of warnings Ocheltree received at work and other incidents of no relevance. Whether Ocheltree was late to work or used the telephone too often is completely irrelevant to the issue of whether she suffered sexual harassment while employed at Scollon Productions.

While Petitioner alleges Ocheltree never complained to management, the record in this case is clear that she made numerous complaints to her immediate supervisor, Hirsch. Ocheltree also attempted to speak to the president and vice-president of the company on several different occasions. The evidence showed that Ocheltree repeatedly complained to the shop supervisor, who ignored her problems. Hirsch was more than just Ocheltree's supervisor; he was part of the harassment, and he participated in the sexual talk almost daily.

The president of the company, Bill Scollon, also ignored Ocheltree. Ocheltree tried to speak to Scollon on several occasions only to be told that he did not have time for her. Scollon would tell her to "go back to work" or "go see Mr. [Ellery] Locklear" (the company's vice-president). Scollon himself even acknowledged that one time when Ocheltree attempted to speak with him, he considered whatever she had to say to be "unimportant."

Locklear also ignored Ocheltree when she tried to voice a complaint. In fact, on one occasion, Ocheltree left a note for Locklear while he was on the telephone. Ocheltree placed the note directly in front of Locklear. The note said "Ellery, Need to talk to you, very important, Lisa." Locklear admitted he saw the note but chose to ignore it and never spoke to Ocheltree.

On other occasions, Ocheltree was stopped by her supervisor from complaining to the top management. Ocheltree testified Hirsch knew she was

going to complain to Locklear or Scollon about the harassment since Hirsch would not act. Hirsch would tell Ocheltree to get back to work and that he would relay the message to Scollon or Locklear, and they would come speak to her. Ocheltree lost track of the number of times she tried to complain to Locklear and was ordered by Hirsch to go back to work.

Additionally, Ocheltree attempted to complain at a "safety meeting" in hopes the minutes would be given to management. The testimony at trial indicated the amount of sexual misconduct and talk increased greatly after Ocheltree complained at the safety meeting. Ocheltree testified that she complained at the safety meeting because minutes were taken by a supervisor and she wanted her complaints documented on paper where they would be passed on to the president and vice-president of the company.

Petitioner next argues it had a written policy in force prohibiting sexual harassment. However, as the *en banc* panel noted, the purported policy amounted to little more than a section on "talking" and an "open door policy." The "open-door" policy was far more closed than the label suggests. Ocheltree was rebuffed on numerous occasions when she tried to speak to management. The few times Ocheltree was able to approach management, she was sent away or ignored by them. On one occasion, Ocheltree attempted to talk to Locklear on a separate issue only to be told she did not need to tell him anything, and if she did not like it there she "should go home and be a housewife."

Additionally, Scollon's policies did not require a supervisor to report incidents of sexual harassment to management. The shop supervisor not only failed to report the harassment and Ocheltree's complaints about the harassment, but he actively tried to prevent her from complaining to management. The work environment was so bad that Ocheltree often had to leave the work area and go to the restroom to escape the sexual harassment and regain her composure. Hircsh would wait for her to exit, however, so that she could not go to complain to management.

Scollon failed to provide reasonable avenues for employees to complain about harassment. Any channel they did provide for complaints was ineffective and inadequate and was not followed. Petitioner should not be allowed to rely upon a farce of a policy which was ignored even by supervisors and management.

Finally, Petitioner states Ocheltree knew if a complaint were made, "someone would be fired." The employee fired in June of 1994 was continuously breaking molds and had previously been warned for sexual misconduct towards other women as well. The gentleman who relayed Ocheltree's complaint to management was already on his way to complain to Scollon about this employee's extremely poor work performance. Scollon even admitted at trial the complaint also revolved around molds that the employee kept breaking.

Ocheltree complained to her supervisor, the vice-president of the company, and the president of the company per the "open-door" policy, and she was ignored. According to Scollon's trial testimony, on one occasion he ignored Ocheltree because he considered whatever she had to say "a smoke screen" - never affording her the opportunity to say anything.

Petitioner's recitation of the facts clearly fails to apply the fundamental principles that courts must "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh evidence." *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150-151 (2000). Once the facts are reviewed as they were actually presented at trial, the Petition in this case fails to present evidence to support the granting of a Writ of Certiorari by this Court.

REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

I. NO SPLIT EXISTS AMONG THE CIRCUIT COURTS REGARDING ANY LEGAL ISSUE IN THIS CASE

Petitioner's desire to raise a conflict between the Circuit Courts of Appeals is premised on speculation and is wholly unsubstantiated. Petitioner asserts there is a split among the circuits, but nowhere in the Petition is this alleged split specifically defined. A conflict of circuits is not implicated in this fact-specific case. Instead, the Fourth Circuit, sitting *en banc*, upheld a jury's finding that Ocheltree was subjected to a

hostile working environment in violation of Title VII. The evidence presented at trial showed a working environment full of sexually crude speech and misconduct, much of which reflected a general hostility toward women. Many instances of conduct were directed specifically at Ocheltree "because of her sex."

In order to establish a claim under Title VII, Ocheltree had to prove that the offending conduct: (1) was unwelcome, (2) was because of her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Spicer v. Com. Of Va. Dept. of Corrections*, 66 F.3d 705 (4th Cir. 1995) (*en banc*).

Contrary to Petitioner's argument, the Fourth Circuit did not uphold the jury's finding of sexual harassment based on speech or conduct that was not clearly "because of sex." The *en banc* panel upheld the jury verdict because it found there was sufficient evidence to support the jury's determination that the speech or conduct was because of sex. The Fourth Circuit did not rely upon a disparate impact theory of non-harassing conduct. Rather, the panel held "[m]uch of the conduct, a jury could find, was particularly offensive to women and was intended to provoke Ocheltree's reaction as a woman." *Ocheltree v. Scollon Productions, Inc.*, 335 F. 3d 325, 332 (4th Cir. 2003) (*en banc*).

In *Oncale*, this Court offered three examples of ways in which an inference that harassment is "because of sex" could be drawn. These examples, while not

exhaustive, include (1) desire-based "explicit or implicit proposals of sexual activity;" (2) use of "sex-specific and derogatory terms" demonstrating a general hostility toward the presence of the harassee's sex in the workplace; and (3) "comparative evidence about how the harasser treated members of both sexes in a mixed-sex workplace." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998). This case falls squarely within the second prong.

As the *en banc* panel noted, "a jury could find that the men in the production shop 'harassed [Ocheltree] in such sex-specific and derogatory terms . . . as to make it clear that [they were] motivated by general hostility to the presence of [a] wom[a]n in the[ir] workplace.'" *Ocheltree v. Scollon Productions, Inc.*, 335 F. 3d 325, 333 (4th Cir. 2003) (*en banc*) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)). The Fourth Circuit went on to hold that "a reasonable jury could find that, taken together, the various mannequin incidents, the vulgar song and picture, and the graphic descriptions of sexual activity (especially oral sex) that consistently painted women in a sexually subservient and demeaning light were sufficiently severe or pervasive to alter the conditions of Ocheltree's employment and to create an abusive working environment." *Ocheltree v. Scollon Productions, Inc.*, 335 F. 3d 325, 333 (4th Cir. 2003) (*en banc*).

Petitioner cites several cases as being in conflict with the Fourth Circuit's opinion in this case. However, none of the cases cited by petitioner raises a conflict among the circuits. For example, *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F. 3d 1164 (7th

Cir. 1996) simply held that under the facts of that case the use of the term "bitch" does not support an automatic inference that the language was motivated by sex. In *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 595 (5th Cir. 1995) the court merely held that based on the facts of that particular case, there was not conduct severe or pervasive enough to create an objectively hostile work environment. The circuit courts in those cases simply analyzed the specific facts and circumstances of each case under the law, just as the Fourth Circuit did in this case.

The few cases cited by Petitioner as allegedly being in conflict with the decision of the Fourth Circuit in this case neither reflect any departure from this Court's decisions regarding sexual harassment, nor do they point to any conflict among the circuits. The Fourth Circuit's opinion simply followed the law based on this Court's decisions in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and their brethren.

While Petitioner claims that there is a split among the circuits, it is clear from the case law that no such split exists. Any split in the circuits perceived by Petitioner is merely due to the fact-specific nature of sexual harassment cases and the need for courts to "look[] at all of the circumstances." *Harris* at 23. A careful reading of these cases makes it clear that there is no conflict between the decisions of the circuit courts.

II. THIS COURT HAS ALREADY DEFINED THE "SEVERE OR PERVASIVE" STANDARD

There exists no reason for the Court to grant the Petition based upon this issue. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) this Court clearly established the standard for determining when conduct is sufficiently severe or pervasive to create an abusive working environment. This Court held that the inquiry involves an examination "of all of the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Such determinations are to be made by the jury, as the jury did in this fact-specific case.

As this Court has noted, the real impact of "workplace behavior depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). Despite Petitioner's argument, the culture and attitudes of a workplace do not excuse sexual harassment. "There is no assumption-of-risk defense to charges of workplace discrimination." *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999). Even if the conduct was occurring prior to Ocheltree's arrival, sexual harassment cannot be "grand-fathered in."

Other circuit courts have held that the entire working environment and all actions in it must be examined when analyzing a hostile work environment claim under Title VII. *See O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001) (holding courts "should avoid disaggregating a hostile work environment claim, dividing sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct"); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F. 3d 62 (2nd Cir. 2000) (holding that plaintiff need not be the target of racial comments made to other employees in order for them to support the plaintiff's discriminatory harassment claim); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 571 (2d Cir. 2000) (stating that the creation of a hostile work environment includes conduct when plaintiff is not present and not the target); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) ("a play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but in the overall scenario" - finding of harassment based in part on sexual innuendo, sexual materials and sexual conduct in the workplace); *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989) (entering into a work environment heavily polluted with sexual abuse does not welcome abuse); *Jackson v. Quanex Corp.*, 191, F.3d 647, 660 (6th Cir 1999) (holding in case where the plaintiff experienced harassing conduct as well as overhearing racist slurs that "offensive comments need not be directed at a plaintiff in order to constitute conduct violating Title VII"); *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) (stating that prevailing culture cannot

excuse discriminatory conduct); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997) ("conduct [that] disproportionately affected female staff could support a determination that the harassment was based on sex"); *Turnball v Topeka State Hosp.*, 255 F. 3d 1238 (10th Cir. 2001) ("conduct that affects both sexes may constitute sexual harassment if it disproportionately affects female staff").

The trial judge in this case had the benefit of this Court's guidance when he charged the jury, just as the Fourth Circuit had this Court's guidance in reviewing the jury verdict. Petitioner claims that the environment, at worst, was "unpleasant." The record reflects Ocheltree was humiliated and embarrassed; there were times when she would turn red and have to leave her workplace. Ocheltree's situation is characteristic of the difficulties many women must face when entering a predominantly male workplace – women are often not welcomed and men's behavior and discussions toward and about women can and often do graphically convey that message.

This Court has clearly defined the "severe or pervasive" standards to be utilized by courts and juries. The Fourth Circuit properly reviewed the jury verdict applying the standards this Court has established for courts and juries to use when determining if conduct is sufficiently severe or pervasive.

CONCLUSION

This Court should deny Scollon's Petition for Writ of Certiorari.

Respectfully submitted,

JOYE & LOCKLAIR

John Wesley Locklair III
Counsel of Record for Respondent
3575 Highway 17 Business
Murrells Inlet, SC 29576
(843)357-6454

William E. Hopkins, Jr.
MCCUTCHEN, BLANTON,
JOHNSON & BARNETTE, LLP
1414 Lady Street
Post Office Drawer 11209
Columbia, SC 29211
(803)799-9791

Attorneys for Respondent